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No. 91-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GUAM HAKUBOTAN, INC.,
Petitioner,

v.

FURUSAWA INVESTMENT CORPORATION,
JULALE INVESTMENT CORPORATION, and
YASUDA SHOJI KK,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's rule of full *de novo* review of local law determinations of Guam courts is in conflict with the doctrine of *De Castro v. Board of Commissioners*, 322 U.S. 451 (1944), prohibiting *de novo* review of local law determinations of territorial courts?

2. Whether a court of appeals may set aside the finding of fact made by the trial court, resolve factual disputes on questions of the parties' intent in favor of the appellant, and direct entry of judgment for appellant, or do so without even a remand for a new trial?

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PETITION FOR WRIT OF CERTIORARI

Guam Hakubotan, Inc. ("Hakubotan") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1] Applying a *de novo* standard of review, that court reversed the judgment of the three-judge Appellate Division of the District Court of Guam, which had affirmed the Guam Superior Court's determination that a warranty deed executed by petitioner Hakubotan in favor of respondents Furusawa Investment Corporation, *et al.*

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[1] Guam Hakubotan, Inc. is owned by Hakubotan Enterprises, Inc., a Guam corporation. It has no subsidiaries. Supreme Ct. R. 29.1.

("Furusawa") was a security device rather than a conditional sale.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 947 F.2d 398 and is reproduced in Appendix A. The opinion of the District Court of Guam, Appellate Division, is reproduced in Appendix B. The opinion and judgment of the Superior Court of Guam, Territory of Guam, is reproduced in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 17, 1991. Hakubotan filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on November 21, 1991. The petition was denied January 13, 1992 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved is the Organic Act of Guam, 48 U.S.C. sections 1421-1428, which establishes a court system and a civilian government for Guam. The text of sections 1424, 1424-1, 1424-2 and 1424-3, governing Guam's independent judiciary, is reproduced in Appendix E.

Section 2889 of the Guam Civil Code provides:

> All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void.

Section 2924 of the Guam Civil Code provides:

> (a) Every transfer of an interest in property, made only as a security for the performance of another act, is to be deemed a mortgage . . . .

> (b) Every transfer or conveyance of any interest in real property by deed of trust or otherwise, with right reserved to repurchase, executed and delivered to secure the performance of another act, is to be deemed a mortgage.

STATEMENT

This Court has repeatedly proscribed *de novo* review by the federal courts of decisions of local territorial courts in order to "leave appropriate scope for the development by those courts of a system of law which, differing from our own in its origins and principles, would nevertheless be suitable to local customs and needs." *De Castro v. Board of Commissioners*, 322 U.S. 451, 455 (1944).

There, this Court stated:

> If the rule thus announced by the insular court is one which is not plainly inconsistent with established principles of the local law, or in their absence is one accepted by the practice of the community, it will not be rejected here merely because it is not in logical harmony with the rules which we would apply to a community within the United States. *It will be rejected only on a clear showing that the rule applied by the local court does violence to recognized principles of local law or established practices of the local community.*

Id. at 455-56 (emphasis added). The "'error must be clear or manifest [or] the interpretation . . . *inescapably wrong.*'" *Id.* at 458 (quoting *Bonet v. Texas Co.*, 308 U.S. 463, 471 (1939) (emphasis added)). This rule is in conformity with Congress's intent in enacting and amending the Organic Act of Guam, which established and then expanded self-government for the People of Guam. 48 U.S.C. §§ 1421-1428.

In 1988, the Court of Appeals for the Ninth Circuit in *Guam v. Yang*, 850 F.2d 507, abruptly departed from

this rule as well as its own twenty-five-year precedent.[2] Without any reference to this Court's controlling decisions, the Ninth Circuit declared that it acted as "Guam's 'Supreme Court' ", *id.* at 510 n.4, and held that "the proper standard of review for questions of law is a *de novo* standard, which accords *no* deference to interpretations of local law by the Appellate Division of the District Court of Guam." *Id.* at 511 (emphasis added).

In the present case, the Ninth Circuit applied the *de novo* standard of review to overturn the unanimous decisions of two local Guam courts in favor of petitioner. Indeed, it directed entry of judgment for respondent, who lost below in both Guam courts. A more direct and rough-shod treatment of a local law determination would be hard to imagine.

Although the issues raised herein are important and recurring issues of federal court governance, the underlying dispute is purely a local law matter. Hakubotan filed its complaint on October 6, 1986, seeking to construe as a mortgage a deed it had executed in favor of Furusawa. Hakubotan is a Guam corporation that in April 1985 had borrowed 170 million yen (approximately $650,000) from Furusawa. The loan had a term of one year and was secured by a mortgage on five parcels of property at Tumon Bay, a resort area akin to Waikiki.

Just before the principal was due to be paid under the terms of the loan, Hakubotan and Furusawa negotiated a six-month extension of the loan on the same terms. As a

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[2] In 1963, in *Gumataotao v. Guam*, 322 F.2d 580, 582 (9th Cir. 1963), the Ninth Circuit, citing *De Castro*, held that "decisions of local courts of United States territories on matters of purely local law will not be reversed unless clear and manifest error is shown" (citations omitted). This rule was followed in at least fifteen reported cases over the next twenty-five years. *See, e.g., Schenck v. Guam*, 609 F.2d 387, 390 (9th Cir. 1975) (citing *De Castro*); *Chase Manhattan Bank, N.A. v. Gems-by-Gordan, Inc.*, 649 F.2d 710, 712 (9th Cir. 1981); *Brown v. Civil Service Commission*, 818 F.2d 706, 708 (9th Cir. 1987).

condition of the extension, Hakubotan delivered a warranty deed to Furusawa purporting to convey the five mortgaged properties to Furusawa. Furusawa claimed to be authorized to record the deed in the event that Hakubotan defaulted during the extension period. The note evidencing the original loan and the original mortgage securing the loan remained in effect. When the six-month extension of the loan expired, Hakubotan requested a further extension, but Furusawa refused and recorded the warranty deed. Hakubotan then brought an action contending that the deed was actually intended as a mortgage pursuant to Guam Civil Code section 2924, that Furusawa was limited to the remedies of a mortgagee, and that Hakubotan had not alienated its right of redemption under Guam Civil Code section 2889.

After a nine-day trial, the Superior Court of Guam (the Honorable Janet Healy Weeks) found, by clear and convincing evidence, that the deed had been intended as a security device and not as a conditional sale. The court set forth its finding in a 24-page decision (App. C).

Furusawa then timely appealed to the District Court of Guam, Appellate Division, which, by statute, serves as the highest appellate court on Guam. In its opinion, the three-judge appellate panel noted that the parties did not challenge the trial court's factual findings (App. B at 17a) and affirmed the trial court's holding that the " 'conditional sale' agreement was, in actuality, a security transaction made in contravention of [Guam Civil Code section] 2889" (App. B at 18a).

Furusawa timely appealed to the United States Court of Appeals for the Ninth Circuit, which reversed and directed judgment for Furusawa (App. A). Stating "we review the appellate division's application of Guam law *de novo*," (*id.* at 5a), the Ninth Circuit rejected the two lower courts' interpretations of Guam law (*id.* at 11a). Among other things, the Ninth Circuit held that the two Guam courts misunderstood the Guam Civil Code and ap-

plied the wrong test for whether a deed is a disguised security device (*id.* at 8a-9a). It also found that "the evidence does not support the lower court's view" and that the "more logical and economically sensible interpretation" of the deed was that it was not a "mortgage" for purposes of the Guam Civil Code (*id.* at 8a).

Hakubotan filed a timely petition for rehearing, arguing that the Ninth Circuit had incorrectly applied the standard of review and that its interpretation of the loan extension agreement had misinterpreted Guam law and was contrary to Guam public policy. The petition for rehearing was denied January 13, 1992 (App. D).

In its brief to the court of appeals, petitioner Hakubotan acknowledged that the en banc decision in *Yang* controlled the scope of review of issues of law before that court (Appellee's Brief at 10). Petitioner further argued that "the true nature of the loan extension ... poses factual questions masquerading as legal issues" and that therefore, under Rule 52, the findings of the Guam trial court "should be reversed only if 'clearly erroneous'" (*id.*). Finally, petitioner argued that "whether a deed absolute was intended to be a mortgage is essentially a factual issue which should not be overturned unless clearly erroneous" (*id.* at 13) or, alternatively, that it was "a mixed question of fact and law" similarly subject to deferential review (*id.* at 13-14).

Petitioner was foreclosed from directly challenging *Yang* by the Ninth Circuit rule that its en banc decisions may not be challenged before a three-judge panel. *E.g.*, *Guam v. Ibanez*, 880 F.2d 108, 112 n.4 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 2631 (1990) (criticism of counsel who contested *Yang* standard of review before three-judge panel). In its Petition for Rehearing and Suggestion for Rehearing En Banc, petitioner did, however, argue that the Ninth Circuit's *de novo* interpretation of Guam law was contrary to the explicit provisions of the relevant

Guam statutes as interpreted by the Appellate Division, and thus contrary to Guam public policy (Petition for Rehearing at 1, 14-15). In these circumstances, petitioner raised the issues presented herein as fully as the Ninth Circuit's practice permitted.

At all events, the Ninth Circuit has already given plenary consideration to the issue such that it comes to this Court with the full benefit of the Ninth Circuit's analysis. Moreover, the proper standard of review is "an important, recurring issue" that should be heard by this Court. *See Carson v. Green*, 446 U.S. 14, 17 n.2 (1980) (deciding even an issue not presented below where "the interests of judicial administration will be served by addressing the issue on its merits"). The *Yang* issue is a recurring one before the Ninth Circuit, as demonstrated by at least 18 cases in which it has arisen in the past three and one-half years, since June 1988.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S *DE NOVO* REVIEW OF THE LOCAL LAW OF GUAM AS DETERMINED BY TWO GUAM COURTS IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND CONGRESSIONAL INTENT

An unbroken line of decisions of this Court prohibits the type of *de novo* review of legal determinations of local territorial courts that occurred in this case. In order for a federal court of appeals to reverse a decision of a territorial court in a matter of local concern " *'the error must be clear or manifest [or] the interpretation must be inescapably wrong.'* " *De Castro v. Board of Commissioners*, 322 U.S. at 458 (quoting *Bonet v. Texas Co.*, 308 U.S. at 471 (emphasis added)). If "the rule adopted by the local tribunal is an intelligible one, not shown to be out of harmony with local law or practice, it is not to be rejected because we think a better could have been devised . . . ." *Id.* at 458-59. As this Court explained:

> From the beginning we have recognized that the appellate review of insular cases was not given to the federal courts for the purpose of superimposing upon the Spanish law our common law preconceptions, except so far as that law must yield to the expressed will of the United States. Hence we have emphasized as a cardinal principle of review in such cases that the mere fact that our own system of law and statutory construction would call for the application of one rule to a given set of facts, does not preclude the adoption of a different one by the insular courts.

Id. at 455 (citations omitted).[3]

The deference that must be accorded territorial courts "is comparable to that presented when, upon appeals from federal district courts sitting in the states, the federal appellate courts are required to follow state law under the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64." *De Castro v. Board of Commissioners*, 322 U.S. at 459 (citations omitted). *See Waialua Co. v. Christian*, 305 U.S. at 109 ("the arguments of policy in favor of having the state courts declare the law of the state are applicable to the question of whether or not territorial courts should

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[3] *See also, e.g., Villanueva v. Villanueva*, 239 U.S. 293, 299 (1915) (Court will "follow and sustain the local law as applied by the [territorial] court below unless we are constrained to the contrary by a sense of clear error committed"); *Waialua Agricultural Co. v. Christian*, 305 U.S. 91, 109 (1938) ("the preference of a federal court as to the correct rule of general or local law should not be imposed" on the territories and rulings of territorial courts will therefore be reversed "only in cases of manifest error"); *Diaz v. Gonzales y Lugo*, 261 U.S. 102, 105 (1923) ("[t]his Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern"); *In re Sawyer*, 360 U.S. 622, 640 (1959) ("this Court and the Courts of Appeals must give the Territorial Courts freedom in developing principles of local law, and in interpreting local legislation"); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 43 (1970) (a territorial court "should not be overruled on its construction of local law unless it could be said to be 'inescapably wrong' ") (citation omitted).

declare the law of the territories with the least possible interference," citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

When Congress enacted the Organic Act of Guam, ch. 512, 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. §§ 1421-1428), and established self-government for the people of Guam, deference to insular courts was clearly the "contemporary legal context" in which Congress legislated. *See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381 (1982). The Organic Act established a democratic local government for Guam consisting of an executive, a legislature with full power to enact local law and *"an independent judiciary . . . administering a system of law based on local needs and local traditions. . . ."* S. Rep. No. 2109, 81st Cong., 2d Sess. (1950), *reprinted in* 1950 U.S.C.A.A.N. 2840, 2841 (emphasis added). A "District Court of Guam" was created, with jurisdiction over (1) cases arising under the laws of the United States; (2) cases arising under Guam law which the Guam legislature had not transferred to island courts; and (3) such appellate jurisdiction as the Guam legislature might determine. Organic Act of Guam, ch. 512, § 22(a), 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. § 1424). The Ninth Circuit was given jurisdiction to hear appeals from certain final decisions of the District Court of Guam. Organic Act of Guam, ch. 512, § 23(a), 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. § 1424-3(c)).

In 1951, under the authority of the Organic Act, the First Guam Legislature enacted Public Law 17, which gave the local island courts exclusive jurisdiction over certain cases and provided that appeals from the island courts would be heard by a three-judge appellate division of the District Court of Guam. *See Guam v. Olsen*, 431 U.S. 195, 197 (1977); *Corn v. Guam Coral Co.*, 318 F.2d 622, 624 (9th Cir. 1963).

In 1958, Congress amended section 22(a) of the Organic Act to provide that the District Court should have "such appellate jurisdiction as the [Guam] legislature may determine" and formally adopted the existing three-judge appellate division that had been created by the Guam legislature in 1951. Act of June 4, 1958, Pub. L. 85-444, § 1, 72 Stat. 178 (codified as amended at 48 U.S.C. § 1424-3). *See Guam v. Olsen*, 431 U.S. at 197 n.2; *Agana Bay Dev. Co. (Hong Kong) Ltd. v. Supreme Court of Guam*, 529 F.2d 952, 960 n.2 (9th Cir. 1976) (J. Kennedy dissenting); *Corn v. Guam Coral Co.*, 318 F.2d at 627. The Ninth Circuit continued to have jurisdiction to hear appeals from the Appellate Division. 48 U.S.C. § 1424-3(c).

In 1984, the Organic Act was again amended to provide that relations between the local courts of Guam and those of the United States are to be the same as those between the state and federal courts. 48 U.S.C. § 1424-2 (originally enacted as Act of Oct. 5, 1984, Pub. L. 98-454, Title VIII, § 801, 98 Stat. 1742). Congress also granted the Guam Legislature the power to create its own appellate courts in lieu of appeals from local courts being heard by the three-judge Appellate Division of the District Court. 48 U.S.C. § 1424-1(a).[4] For a period of fifteen years following the establishment of a local appellate court, the Ninth Circuit will have jurisdiction to "review by writ of certiorari" all decisions of the appellate court. 48 U.S.C. § 1424-2. The Guam legislature has not yet established a Guam appellate court and appeals from decisions of the local Superior Court continue to be heard by the Appellate Division of the District Court of Guam. Final decisions of the Appellate Division

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[4] In *Guam v. Olsen*, 431 U.S. 195 (1977), this Court held that the Organic Act did not authorize the Guam Legislature to establish a supreme court. In enacting the 1984 amendment to the Organic Act, Congress corrected the oversight and authorized such a court.

are reviewable by the Ninth Circuit. 48 U.S.C. § 1424-3 (c).[5]

The District Court of Guam thus has two distinct and separate roles. It can act as a federal District Court with original federal question jurisdiction. *See Guam v. Olsen*, 431 U.S. at 199-200 (1977). Unlike other district courts, however, it also sits as a three-judge Appellate Division and functions as the highest local territorial appellate court, the jurisdiction of which is determined exclusively by the Guam legislature. *See Schenck v. Guam*, 609 F.2d 387, 390 (9th Cir. 1979).[6] In the present case, Hakubotan's claim arose solely under local Guam law. It was brought in the territorial Superior Court, and was affirmed by the three-judge panel of the Appellate Division.

Congress knew of the deferential standard of review required by this Court's decision in *De Castro* and its predecessors when it enacted and then amended the Organic Act. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). In fact, in enacting the 1984 amendment to the Organic Act, which addressed the Ninth Circuit's jurisdiction to review decisions of the

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[5] The Organic Act as amended in 1984 provides that "the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out" its review of Appellate Division decisions. 48 U.S.C. § 1424-3(c). Congress explained that this provision permits the Ninth Circuit to limit its review to "certiorari or other method of summary disposal as provided by rule." 130 Cong. Rec. at 23,791 and 25,476 (1984).

[6] That the Appellate Division is a local court is clearly demonstrated by the legislative history. The Guam Legislature created the three-judge appellate panel when it enacted Public Law 17 in 1951. When Congress amended the Organic Act in 1958, it was thus "recognizing and making suitable procedural provisions for the appellate division of the district court as it now exists under the local law." S. Rep. No. 1582, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.A.A.N. 2623. *See Guam v. Olsen*, 431 U.S. at 197 n.2; *Agana Bay Dev. Co. v. Supreme Court of Guam*, 529 F.2d at 960; *Corn v. Guam Coral Co.*, 318 F.2d at 627.

Appellate Division of the District Court, Congress specifically referenced a decision of the Ninth Circuit requiring deferential review of interpretations of local law by a territorial court. 130 Cong. Rec. at 23,791 and 25,476 (1984).[7] Thus, Congress's failure to disturb this consistent judicial interpretation indicates that " 'Congress at least acquiesces in, and apparently affirms, that [interpretation].' " *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330, 338 (1988) (quoting *Cannon v. University of Chicago*, 441 U.S. at 703).[8]

Nevertheless, as stated, in 1988 in an en banc opinion the Ninth Circuit declared that it would no longer defer to the legal determinations of Guam courts and imposed a *de novo* standard of review—even for issues of local Guam law. *Guam v. Yang*, 850 F.2d 507. The court boldly stated that it, meaning the Ninth Circuit, was "Guam's Supreme Court." *Id.* at 510 n.4. Conspicuously absent from the *Yang* decision was any reference to this Court's contrary and unbroken line of decision which mandated an opposite result.

The *Yang* approach has been followed in at least eighteen cases since 1988 and expressly followed again by the Ninth Circuit in this case. Citing *Yang*, the court

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[7] The Senate explanation of the 1984 amendment referred to the Ninth Circuit's decision in *Camacho v. Civil Service Commission*, 666 F.2d 1257, 1262 (9th Cir. 1982), which applied a deferential standard in reviewing the decisions of the appellate division of the district court of the Northern Mariana Islands. " 'Interpretations of local law by a district court sitting in the locality are entitled to great weight. They will not be disturbed unless clearly wrong.' " *Id.* (quoting *S.A. Empresa De Viacao Aerea Rio Grandense v. Boeing Co.*, 641 F.2d 746, 752 (9th Cir. 1981)). Congress described the judicial scheme in the Northern Mariana Islands as being the same as that of Guam. *See, e.g.*, 130 Cong. Rec. at 23,791 and 25,476. Cf. 48 U.S.C. §§ 1424 to 1424-3 *with* 48 U.S.C. §§ 1694-1694c.

[8] This conclusion is bolstered by the fact that Congress authorized the Ninth Circuit to enact rules permitting "summary disposal" of appeals from decisions of the Appellate Division. 130 Cong. Rec. at 23,791 and 25,476; *see* 48 U.S.C. § 1424-3(c).

reviewed the Appellate Division's application of Guam law *de novo* (App. A at 5a).

This was error. Even though the Ninth Circuit disagreed on "policy" grounds, the trial court's eight-factor test addressing all the facts and circumstances on the issue of intent was not "inescapably wrong." *De Castro v. Board of Commissioners*, 322 U.S. at 458. For example, it was not "inescapably wrong" to consider, as the trial judge did, the fact that the creditor-debtor relationship continued after the delivery of the deed and the fact that Hakubotan continued to develop the property (see App. C at 36a-37a). And, it was not "inescapably wrong" for the trial judge to consider the fact that the great disparity in land value over the loan amount showed an intent to create a security device (*see id.* at 37a, 43a-44a). Even the Ninth Circuit had to acknowledge that this was a " 'strong circumstance tending to show that the deed was intended to operate as a mortgage' " (App. A at 9a n.3 (quoting *Beeler v. American Trust Co.*, 24 Cal. 2d 1, 17, 147 P.2d 583, 592 (1944)).[9]

The Appellate Division reviewed the interpretation of the Guam Civil Code provision *de novo* (App. B at 17a) and upheld the trial court (see *id.* at 18a).

The Ninth Circuit rejected the legal interpretation of both Guam courts of their own Civil Code, holding that the two lower courts had applied the wrong legal test. The Ninth Circuit held that the Guam Civil Code required an evaluation of intent as of the date of recording of the deed rather than upon delivery of the deed (App. A at 8a-9a). This swept away certain factors relied on by the Guam courts, such as the continuation of a lender-borrower relationship upon delivery of the

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[9] Hakubotan borrowed approximately $650,000 from Furusawa. At the time of trial, the court found that the land was worth approximately $4.2 million (App. C at 43a-44a). Since the trial, land values in Tumon Bay soared, and petitioner now values the land at over $50 million.

deed, and the fact that Hakubotan continued to develop the property. The Ninth Circuit was also critical of the Guam courts' reliance on the fact that the money lent was far below the fair market value of the property (*id.* at 9a n.3), although no less an authority than this Court has agreed with the Guam courts that this factor indicates a security arrangement rather than a sale.[10] Having defined the rule of decision, the Ninth Circuit then evaluated the record and found that the deed was not intended as a security device. "The more logical and economically sensible interpretation" of the evidence, in the Ninth Circuit's view, was that the deed was simply a conditional sale (*id.* at 8a). This conclusion, the Ninth Circuit held, was required *"as a matter of policy"* (*id.* at 12a) (emphasis added).[11]

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[10] On precisely this ground, as both the Superior Court and Appellate Division observed (App. C at 25a-26a; App. B at 17a), this Court held that a purported deed was a mortgage. *Peugh v. Davis*, 96 U.S. 332, 337-38 (1878).

[11] The Ninth Circuit also held that, because Guam's Civil Code was borrowed in 1933 from California's Civil Code, pre-1933 California decisions "are binding, while later [California] decisions are persuasive" (App. A at 5a). The Circuit was therefore critical of the Guam Superior Court's reference in its opinion to *Holden Land & Livestock Co. v. Interstate Trading Co.*, 87 Kan. 221, 227, 123 P. 733, 736 (1912) (App. A at 11a n.4). However, although the Guam court found "the public policy reasoning behind" *Holden* to be persuasive, it in fact based its holding on *California* authority (App. C at 31a).

The origin of the Ninth Circuit's rule is dubious, since it traces back to *United States v. Johnson*, 181 F.2d 577, 580 (9th Cir. 1950), a case that arose in California, not Guam, and which did *not* address or adopt the "binding/persuasive" test. Guam courts should be free to distinguish pre-1933 California statutory construction. *See* Sutherland Statutory Construction § 52.02 (5th ed. 1991) (and cases cited therein); *see also Whitney v. Fox*, 166 U.S. 637, 647 (1897); *State v. Ebner*, 126 Ariz. 355, 616 P.2d 30, 36 (1980); *cf. Lynn v. Chin Heung Int'l, Inc.*, 852 F.2d 1221, 1223 (9th Cir. 1988) (deferring to Guam court's interpretation of its court rules, even though those rules were borrowed from the Federal Rules of Civil Procedure).

The Ninth Circuit's substitution—*de novo*—of its own policy views for that of two Guam courts flies in the face of this Court's decisions that rules of law adopted by the territorial courts are "not to be rejected because we think a better could have been devised . . . ." *De Castro v. Board of Commissioners*, 322 U.S. at 459.

The root of the error was the Ninth Circuit's uncritical and unwarranted extension of the *de novo* rule of *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984). In *McLinn*, the Ninth Circuit held that it would review *de novo* a district court's interpretation of state law. *Id.* at 1397. The court reasoned that its review was the first appellate review of the trial court's conclusions of law and that "[e]very party is entitled to a full, considered, and impartial review of the decision of the trial court." *Id.* at 1398. The Ninth Circuit in *McLinn* also noted that the appellate court is structurally better suited to make decisions of law than a district court since there are three judges considering the legal issues unencumbered by the evidentiary process. *Id.* at 1398. *Accord Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991).

This reasoning, of course, does not apply here. *First*, when a district court applies state law, it is still bound to defer to the law of the state—it may not substitute its own policy judgment for the policy adopted by the state. Similarly, when the case is appealed, even if the court of appeals need not give deference to (and may review *de novo*) the district judge's determination of state law, the court of appeal must defer to and may not substitute its policy judgment for that of the state authorities. In contrast here, the Guam superior court and the appellate division determined local law—not as a federal district court attempting to apply the law as it would be interpreted by a local court—but rather as *local* courts applying their own local law in the first instance. Deference

to local conclusions of law is therefore required under *De Castro* and mandated by Congress.[12]

Second, the Appellate Division is not interpreting Guam law as a district court with original jurisdiction over the dispute. Rather, it is sitting as a three-judge *appellate* court reviewing the trial court's interpretation of Guam law. It reviews decisions of the trial court *de novo*, not the Ninth Circuit. Thus, the Ninth Circuit is the *second* appellate panel to review the territorial trial court's conclusions of law. "[T]he parties have already been accorded full appellate review," *In re McLinn*, 739 F.2d at 1399, and the Ninth Circuit should defer to the judgment of the Appellate Division. *See Runyon v. McCray*, 427 U.S. 160, 181-82 (1976) ("accept[ing] the interpretation of state law in which the District Court and the Court of Appeals have concurred *even if an examination of the state-law issue without such guidance might have justified a different conclusion*") (original emphasis omitted, emphasis added; citations omitted).[13]

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[12] Section 1424-2 of the Organic Act, as amended in 1984, requires:

> The relations between the courts established by the Constitution or laws of the United States and the local courts of Guam with respect to appeals . . . and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States . . . and the courts of the several States . . . .

48 U.S.C. § 1424-2. *De novo* review means that the Appellate Division is not being treated the same as state courts.

[13] The Ninth Circuit in *Yang* also purported to have adopted *de novo* review in part in order to avoid a perceived conflict with the Third Circuit. 840 F.2d at 510 (citing *Saludes v. Ramos*, 744 F.2d 992, 994 (3d Cir. 1984)). *Yang* characterized the Third Circuit in *Saludes* as having adopted *de novo* review "of *Appellate Division* decisions of the District Court of the Virgin Islands." 850 F.2d at 510 (emphasis added). The Ninth Circuit was simply wrong. *Saludes* involved a review of legal determinations of a district court sitting as the *federal trial court* "interpret[ing] territorial law in

There are yet other reasons why *de novo* review of local Guam decisions is improper. *First*, Congress has repeatedly recognized that Guam has a background of Spanish civil law and custom that distinguishes its legal system from that of the United States. *See, e.g.*, S. Rep. No. 1582, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.A.A.N. at 2623, 2624; H.R. Rep. No. 951 at 2, 85th Cong., 1st Sess. (1957) A majority of the judges on any Appellate Division panel are from the Marianas, the island group to which Guam belongs.[14] The Appellate Division thus has a greater understanding of and sensitivity to Guam's unique local law and custom than the

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the first instance," 744 F.2d at 994, *not* as a *local* three-judge *appellate court*.

Saludes also incorrectly sought to limit this Court's rule of deference to only two territories—Hawaii and Puerto Rico—that in the Third Circuit's view had "separate, non-federal judicial systems." *Id.* at 993-94. However, the Organic Act of Guam recognizes and promotes a separate, non-federal Guam judicial system that "has considerable similarity to the Organic Act of Puerto Rico." 96 Cong. Rec. 7563 (1950) (statement of Organic Act's sponsor, Rep. Peterson). *See also Agana Bay Dev. Co. v. Supreme Court of Guam*, 318 F.2d at 961. Moreover, *Saludes* was decided *before* Congress amended the Organic Acts of Guam and the Virgin Islands in 1984 to provide the territories with greater autonomy and the power to create their own supreme courts. Act of Oct. 5, 1984, Pub. L. 98-454, Title VIII, § 801, 98 Stat. 1742 (codified as amended at 48 U.S.C. § 1424-1); Act of Oct. 5, 1984, Pub. L. 98-454, Title VII, § 702, 98 Stat. 1737 (codified as amended at 48 U.S.C. § 1611). *See In re Alison*, 837 F.2d 619, 620-21 (3d Cir. 1988).

[14] One of the three judges on the appellate panel is the district court judge from Guam, 48 U.S.C. § 1423-3(b). Another is typically the District Court judge from the Northern Mariana Islands. *See* S. Rep. No. 1582, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.A.A.N. 2623; H.R. Rep. No. 951, 85th Cong., 1st Sess. (1957) (stating Congress's intent that judges assigned to Guam courts be from the general vicinity of Guam). Guam is geographically part of the Northern Mariana Islands and the two share a common culture, language and history. *See* Arnold Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 316, 521-22 (1989).

judges of the Ninth Circuit. *Cf. Guam v. Yang*, 850 F.2d at 510.

Second, contrary to the Ninth Circuit's assertion in *Yang*, 850 F.2d at 510, the decisions of the Appellate Division *are* published and represent an evolving body of Guam jurisprudence that is controlling precedent for Guam's territorial courts. Selected decisions are published in the Federal Supplement, and the Government of Guam publishes Guam Reports, which reports opinions of the Appellate Division. The Ninth's Circuit's opinions are therefore not the only published precedent guiding Guam courts.

Third, the application of a *de novo* standard of review is contrary to the historic trend toward allowing Guam greater autonomy and self-determination. The enactment of the Organic Act in 1950 was the first step toward self-rule by the people of Guam. Each amendment to the Act has continued this trend. When this Court held that the Guam Legislature did not have the power to establish its own Supreme Court, *Guam v. Olsen*, 431 U.S. at 202, Congress amended the Organic Act in 1984 to grant this power. And in 1976, Congress authorized Guam to draft its own constitution "for the local self-government of the people of . . . Guam." Act of Oct. 21, 1976, Pub. L. 94-584, § 2(a), 90 Stat. 2899 (1976). The Ninth Circuit should not be permitted to relegate Guam to the status of an utter dependent in the face of its statutory right to self-rule. On other occasions, the Ninth Circuit tried to encroach upon this Court's respect for local territorial determinations of local law but this Court intervened. *See, e.g., Waialua Agricultural Co. v. Christian*, 305 U.S. at 109-10. It is time, once again, to bring the Ninth Circuit back in line.

II. THE NINTH CIRCUIT ENGAGED IN IMPERMISSIBLE FACT-FINDING

The Ninth Circuit also erred in substituting its own finding as to the intent of the parties and thus usurping the Guam trial court's fact-finding role.

Rule 52(a) states that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a). As this Court has recognized, Rule 52(a) forbids appellate courts from invading the trial court's domain by acting as the finder of fact in the first instance:

> The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."

Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)); *see also Lundgren v. Freeman*, 307 F.2d 104, 114 (9th Cir. 1962).

Reviewing courts owe a high level of deference to the trial court's findings of fact. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). Consequently, an appellate court must accept the trial court's factual determinations unless it has a "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Finally, the reviewing court may never reverse the trial court simply because it would have weighed the evidence differently. *Amadeo v. Zant*, 486 U.S. at 223; *Anderson v. City of Bessemer*, 470 U.S. at 573-74.

The Ninth Circuit violated these straightforward principles in three ways. *First*, the Ninth Circuit simply disagreed with the trial court's assessment of the evidence

on intent. Significantly, the Ninth Circuit did not say the Guam courts' intent findings were "clearly erroneous," as required by Rule 52. *Pullman-Standard v. Swindt*, 456 U.S. 273, 288 (1982) (questions of intent are peculiarly factual issues subject to the clearly erroneous standard). It simply said its own assessment was "more logical" and "economically sensible" (App. A at 8a).[15]

Second, the Ninth Circuit resolved factual disputes left undetermined by the trial court. For example, the trial court noted that, on the one hand, Hakubotan's witness testified that Furusawa demanded the deed and assured Hakubotan that it would not use or record it (App. C at 24a). On the other hand, Furusawa's witnesses testified that Hakubotan voluntarily offered the deed and that Furusawa never promised not to record it (*id.* at 25a). The trial court did *not* resolve this factual dispute (*id.* at 24a-25a). The Ninth Circuit, however, found against petitioner on these very issues. The Ninth Circuit expressly found that Hakubotan had "eventually persuaded" Furusawa to accept the deed and that the parties had agreed that Furusawa would record the deed if Hakubotan defaulted (App. A at 3a).[16] This was error. "[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer*, 470 U.S. at 574. *See also Mayview Corp. v. Rodstein*, 620 F.2d 1347, 1353 (9th Cir. 1980) ("it is for the trial court to resolve conflicts in the evidence").

Third, the Ninth Circuit improperly reversed rather than remanding the case to the trial court for further

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[15] Thus, the Ninth Circuit found that it was illogical for Furusawa to receive no consideration for the six-month extension (App. A at 8a). In fact, Furusawa received consideration in the form of continued exorbitant interest of 18% per annum. This was consideration as a matter of law. *Miller v. Roach*, 15 Cal. App. 2d 427, 431, 59 P.2d 418, 420 (1936).

[16] The Ninth Circuit simply appears to have accepted the statement of facts appearing in *respondent's* brief.

findings (App. A at 12a). Even if the trial judge applied the wrong test, the Court of Appeals should have remanded for findings consistent with the correct test. As this Court observed in a similar context, "[p]roceeding in this manner seems to us incredible." *Pullman-Standard v. Swindt*, 456 U.S. at 293.

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings.

Id. at 291; *see also Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). An appellate court is never relieved of the requirement to remand for further fact determination when it sets aside a trial court's findings for an error of law. *Pullman-Standard v. Swindt*, 456 U.S. at 293.

The Ninth Circuit's fact-finding is thus in direct conflict with the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 6, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 90-15248

GUAM HAKUBOTAN, INC.,
Plaintiff-Appellee,
v.

FURUSAWA INVESTMENT CORPORATION,
JULALE INVESTMENT CORPORATION, and
YASUDA SHOJI KK.,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Guam, Appellate Division

Argued and Submitted May 8, 1991
Decided Oct. 17, 1991

Frederic D. Cohen, Horvitz & Levy, Encino, Cal., for defendants- appellants.

Robert K. Wrede, Lewis, D'Amato, Brisbois & Bisgaard, Los Angeles, Cal., for plaintiff-appellee.

Before SCHROEDER, FLETCHER and FERGUSON, Circuit Judges.

FLETCHER, Circuit Judge:

Defendants Furusawa Investment Corporation, Julale Investment Corporation, and Yasuda Shoji KK appeal from the decision of the Appellate Division of the United States District Court for the District of Guam affirming the judgment of the Superior Court of Guam in favor of plaintiff Guam Hakubotan, Inc. ("Hakubotan"). Hakubotan had procured a loan from Yasuda, secured by a mortgage on real property, and subsequently obtained a six-month loan extension. Pursuant to the loan extension agreement, Hakubotan executed a warranty deed in favor of Yasuda's designee, Furusawa Investment, which was authorized to record the deed if Hakubotan defaulted during the extension period. Hakubotan defaulted, and Furusawa Investment recorded the deed. Hakubotan then brought the present action, claiming that the deed was actually a disguised mortgage and should be voided under Guam Civ.Code § 2889, which prohibits "contracts in restraint of the right of redemption from a lien." The superior court entered judgment for Hakubotan, and the appellate division affirmed. We reverse.

FACTS

The relevant facts, which are not in dispute, are as follows. In March 1985, Hakubotan agreed to purchase from Antonia Camacho two parcels of real property in Guam for $1,895,000. On April 1, 1985, in part to finance its down payment on the property, Hakubotan borrowed from Yasuda 170 million yen (then equivalent to $654,000) at an interest rate of 1.5% per month, with the principal due in one year. Hakubotan delivered to Yasuda a promissory note, twelve post-dated checks for the monthly interest payments, and a post-dated check for the principal. As security for the loan, Yasuda received a mortgage on five parcels of property owned by Hakubotan, including junior mortgages on the two parcels Hakubotan was buying from Camacho. On April 2, Hakubotan executed a

promissory note in favor of Camacho for $1,495,000, secured by senior mortgages on the two parcels.

Hakubotan made all of its monthly interest payments to Yasuda, but in early March 1986, less than one month before the principal was due, it informed Yasuda that it would have difficulty repaying the principal and asked for a six-month extension. At first Yasuda declined, warning Hakubotan that it would initiate foreclosure proceedings in the event of default. However, Hakubotan eventually persuaded Yasuda to grant the extension by proposing a new agreement under which Hakubotan would deed the mortgaged property to Yasuda's designee, Furusawa Investment, if Hakubotan failed to repay the loan at the end of the six months.[1] Hakubotan expressed its willingness to execute a warranty deed conveying the property to Furusawa Investment with the proviso that the deed not be recorded unless Hakubotan defaulted. The parties retained a Guam attorney to memorialize the agreement on behalf of both parties. Before signing the agreement on March 10, 1986, Hakubotan also consulted separate counsel.

The agreement extended the principal repayment date to September 30, 1986, and provided that in the event Hakubotan failed to make all interest and principal payments to Yasuda through that date:

> Furusawa is hereby authorized and empowered by Mortgagor to record the Warranty Deed conveying all right, title and interest of Mortgagor to Furusawa Investment Corporation completely, in which event, the obligation of Mortgagor to Mortgagee under the mortgage secured by promissory note requiring payment of One Hundred Seventy Million Yen

[1] Koretsu Furusawa is the president and principal shareholder of both Yasuda and Furusawa Investment, as well as of the third defendant-appellant, Julale Investment Corporation. Furusawa, himself, is not a named defendant.

> and interest payable in currency of Japan is cancelled and all matter resolved and settled with ownership of all properties listed in Mortgage being in the complete ownership of the Mortgagee. Such transaction shall be interpreted to be a sale of all Mortgagor's interest in all the properties listed in the Mortgage to the Mortgagee for the sum due under the promissory note for principal and interest attached to the Mortgage and *there shall be no rights of redemption or any other right whatsoever remaining in the Mortgagor.*[2]

Agreement ¶ 2 (emphasis added). [ER tab D at 3] Thus, upon Hakubotan's default, ownership of the mortgaged properties would transfer to Furusawa Investment without the need for any foreclosure proceedings or public sale (as provided in the original mortgage agreement), and Hakubotan's debt would be extinguished. Yasuda agreed not to foreclose during the extension period or seek any deficiency judgment, and Hakubotan explicitly relinquished its right of redemption. Upon executing the agreement, Hakubotan delivered six new postdated checks for interest payments and a new check for the principal postdated September 30, 1986. During the six-month extension period, the original promissory note and mortgage remained in full force, and Hakubotan continued to develop the property.

On September 25, 1986, less than a week before the end of the six-month extension, Hakubotan again asked Yasuda for more time to repay the loan. For the next sev-

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[2] The agreement also permitted recordation of the deed if Hakubotan defaulted on its payments due to Camacho, since Camacho held the senior mortgage on two of the pacels of property covered by the mortgage agreement. Although Hakubotan subsequently defaulted on those payments, Hakubotan, Camacho, and Yasuda reached an accommodation, and Furusawa Investment did not record the deed. The events surrounding Hakubotan's default on the Camacho note and subsequent cure are not relevant to the present appeal.

eral days, the parties held discussions and drafted proposed written extension agreements, but they never agreed to an extension. On September 30, 1986, Yasuda deposited the postdated check for the principal. The check was returned for insufficient funds. On October 6, Furusawa Investment recorded the warranty deed.

Hakubotan then filed the present action in the Superior Court of Guam against Yasuda, Furusawa Investment, and Julale Investment Corporation, asking the court to void the deed and treat the transaction as an equitable mortgage upon which the defendants would have to foreclose. The superior court ruled in Hakubotan's favor, finding that the transfer of the warranty deed to Furusawa Investment was nothing more than a continuation of the mortgage, that the deed was void, and that Hakubotan retained its equitable right of redemption. The court further found that Hakubotan had tendered a valid offer to Yasuda to pay the principal amount due, including interest, on November 21, 1986, thereby tolling the accrual of interest. The defendants appealed to the appellate division, which affirmed. The defendants then filed a timely notice of appeal to this court. We have jurisdiction pursuant to 48 U.S.C. § 1424-3(c).

DISCUSSION

We review the appellate division's application of Guam law *de novo*. *Guam v. Yang*, 850 F.2d 507, 511 (9th Cir. 1988) (en banc). In interpreting the provisions of the Guam Civil Code, which governs the present case, we refer to the law of California, from whose civil code the Guam Civil Code was adapted in 1933. *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1456 n. 5 & 1459 (9th Cir. 1988). California decisions before 1933 are binding, while later decisions are persuasive. *Id.* at 1459.

Under the Civil Code of Guam,

> All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured

> thereby, and all contracts in restraint of the right of redemption from a lien, are void.

Guam Civ.Code § 2889 (1970). This provision states the familiar principle of equity and public policy that a mortgagor is not permitted to alienate his right of redemption at the time he enters into a mortgage agreement. *See, e.g., Beeler v. American Trust Co.*, 147 P.2d 583, 595, 24 Cal.2d 1 (1944) (interpreting identical Cal. Civ. Code § 2889); *Bradbury v. Davenport (I)*, 46 P. 1062, 1063, 114 Cal. 593 (1896) (same).

This statutory protection for mortgagors does not, however, render the right of redemption totally inalienable. While a mortgagor cannot alienate the right in conjunction with an initial mortgage agreement, California law clearly permits a mortgagor to transfer his ownership of mortgaged property and his right of redemption in a transaction subsequent to and independent of the initial mortgage. For example, in *Bradbury v. Davenport (II)*, 52 P. 301, 302, 120 Cal. 152 (1898), the Supreme Court of California held that Civil Code Section 2889 does not prohibit a subsequent agreement under which the mortgagee purchases the mortgagor's right of redemption and thereby acquires absolute title. In the court's words:

> A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee.

52 P. at 302 (quoting *Watson v. Edwards*, 38 P. 527, 529, 105 Cal. 70, 75 (1894)); *see also Beeler*, 147 P.2d at 595 (recognizing "unquestioned" right of redemption); *Baldwin v. American Trading Co.*, 243 P. 710, 712, 76 Cal.App. 80 (Cal.Ct.App. 1925) ("[A] mortgagor debtor, at any time after the execution of the mortgage, may, by a separate and distinct transaction, sell or release his equity of redemption to the mortgagee.").

While a mortgagor can sell the mortgaged property to the mortgagee pursuant to a subsequent agreement, California courts carefully scrutinize transactions to ensure that a purported sale is not simply a scheme to deprive a debtor in difficult financial straits of his right of redemption. *Beeler*, 147 P.2d at 595. "[A] deed absolute on its face" is presumptively "what it purports to be," *Wehle v. Price*, 260 P. 878, 879, 202 Cal. 394 (1927), but "may be shown by parol to be intended as a mortgage," *Beeler*, 147 P.2d at 594 (quoting *Vance v. Anderson*, 45 P. 816, 818, 113 Cal. 532, 538 (1896)). The party claiming that a deed is actually a mortgage bears the burden of proof, *Wehle*, 260 P. at 879, and the court, in determining whether a deed is a mortgage, must discern the parties' intent by examining "all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, their relations to one another and to the subject matter." *Beeler*, 147 P.2d at 594 (quoting *Vance*, 45 P. at 818). "The test of a mortgage is whether the relation of debtor and creditor continues so that there is a subsisting debt *after* the conveyance." *Beeler*, 147 P.2d at 594 (quoting *Chapman v. Hicks*, 182 P. 336, 338, 41 Cal.App. 158, 162 (1919)) (emphasis added).

Hakubotan does not contend that the transaction was unfair, dishonest, or fraudulent, nor does it contend that Yasuda was guilty of overreaching. To the contrary, both parties are sophisticated real estate companies, and Hakubotan consulted with its own counsel before entering the agreement. Instead, Hakubotan argues—and it persuaded the lower courts—that the parties intended the agreement as a continuation of the mortgage and not a conditional sale. Hakubotan argues further that since the question of whether the agreement and deed represented a mortgage or a sale is a question of fact, we are to review the superior court's determination only for substantial evidence or clear error. *See Beeler*, 147 P.2d at 587 (appellate court will not disturb trial court's finding

that deed is mortgage "where there is substantial evidence warranting a clear and satisfactory conviction to that effect"); *see also Natural Resources, Inc. v. Wineberg*, 349 F.2d 685, 688 (9th Cir.1965) (whether deed is mortgage is factual question review for clear error) (applying California law), *cert. denied*, 382 U.S. 1010, 86 S.Ct. 617, 15 L.Ed.2d 525 (1966).

We find that the evidence does not support the lower courts' view that the agreement and warranty deed constituted a mortgage. As an initial matter, Hakubotan's characterization of the transaction is inconsistent with the logic and reality of the parties' relationship. The debt already was secured by a mortgage on the property. A deed may be deemed a mortgage if "made for the purpose of securing the payment of a debt," *Beeler*, 147 P.2d at 594, but the deed here did not represent additional security; it merely made it quicker and easier for Yasuda to obtain the property by circumventing the time-consuming process of foreclosure. Under the theory of the transaction proffered by Hakubotan and adopted by the lower courts—*i.e.*, that the deed was simply a continuation of the mortgage—Yasuda received no consideration for the six-month loan extension it gave to Hakubotan. The more logical and economically sensible interpretation of the transaction is that Yasuda granted Hakubotan a loan extension in exchange for a swifter and less complicated means of recouping its losses if Hakubotan were to default, as it did. To interpret the transaction as a simple continuation of the mortgage would be to eliminate incentives for creditors to grant loan extensions sought by debtors and instead create an incentive for creditors simply to initiate foreclosure.

More importantly, Hakubotan and the lower courts have misapplied the test for whether a deed is a mortgage by focusing on the parties' relationship and activities during the loan extension period, rather than after

the conveyance was effected. The essential factor the court must consider in scrutinizing a deed is whether the debt or debtor-creditor relationship effectively continues after the conveyance. *Beeler*, 147 P.2d at 594; *Holmes v. Warren*, 78 P. 954, 956, 145 Cal. 457 (1904) ("[T]he test in all this class of cases is, was there a subsisting debt after the conveyance?"); *Montgomery v. Spect*, 55 Cal. 352, 354 (1880) ("The only inquiry . . . is, whether the relation of debtor and creditor remains, and a debt still subsists between the parties."). In the present case, the conveyance did not occur until the deed was recorded; at that point, ownership of the property transferred to Furusawa Investment and Hakubotan's debt was cancelled. The debtor-creditor relationship ended with the conveyance. The lower courts misdirected their attention to the relationship between the parties during the extension period (and thus before the conveyance). Naturally, during that period, the debtor-creditor relationship continued; Hakubotan, as owner, retained possession of the property and continued to develop it; Yasuda held the promissory note secured by the mortgage; and Furusawa held the deed for the parties in lieu of foreclosure (recordable upon default). However, the recordation of the deed—authorized by the agreement and triggered by Hakubotan's default—erased the debt and transferred the property to Furusawa Investment with finality. After the conveyance, therefore, there was no subsisting debt or debtor-creditor relationship.[3]

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[3] The superior court made much of the fact that the property was worth more than the consideration paid by Yasuda. Although "inequality between the worth of the property and the consideration . . . is a 'strong circumstance' tending to show that the deed was intended to operate as a mortgage," *Beeler*, 147 P.2d at 592, it is not dispositive. Hakubotan was a fully competent, sophisticated real estate concern, and it retained the power to sell the property during the loan extension period. Hakubotan may have made some misjudgments about its ability to repay the loan or about the value of the mortgaged property, but at the time the parties executed the agreement—which was aggressively sought by Hakubotan—the ar-

In *Beeler*, the case upon which Hakubotan places primary reliance, a debtor-creditor relationship effectively continued after the conveyance. The debtor and his bank negotiated a time extension for repayment of the debt, which was secured by a mortgage on the debtor's ranch. Under the arrangement, the debtor deeded the ranch property to the bank, and the bank executed a one-year lease of the ranch to the debtor. The debtor remained responsible for taxes and maintenance and held an option to repurchase the land at any time during the term of the lease. *Beeler*, 147 P.2d at 586. Examining the nature of the transaction, and not merely its form, the court concluded that the deed was a disguised mortgage. In *Beeler*—which involved a sale, a lease-back, and an option to repurchase the property at a price slightly higher than the original price—a debtor-creditor relationship effectively continued after the conveyance. Indeed, the parties specifically designed the arrangement as a way for the bank to clear its books of a mortgage and replace it with an arrangement similar in substance but different in form. *Id.*, 147 P.2d at 596. Upon that evidence, it was perfectly reasonable for the court to conclude that the deed should be deemed a mortgage. *See also Todd v. Todd*, 128 P. 413, 164 Cal. 255 (1912) (deed deemed mortgage where sale was accompanied by option to repurchase for original price plus interest); *Montgomery v. Spect*, 55 Cal. 352 (1880) (same); *Sears v. Dixon*, 33 Cal. 326 (1867) (deed deemed mortgage where sale was accompanied by lease-back at rent equivalent to interest as well as option to repurchase at sale price plus rent). The present case differs in the crucial respect that once the property was conveyed to Furusawa Investment, the debt and the debtor-creditor relationship were extinguished.

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rangement was not unfair or inequitable. *See Deming v. Smith*, 66 P.2d 454, 457-58, 19 Cal.App.2d 683 (Cal.Ct.App. 1937) (declining to treat deed as mortgage despite significant disparity between worth of property and consideration paid).

The one factor that makes the present transaction resemble a mortgage is that the parties agreed to condition the sale on Hakubotan's future default. However, it is perfectly legal under California law for the parties to execute a conditional sale agreement like the one at issue here. In *Bradbury v. Davenport (II)*, 52 P. 301, 120 Cal. 152 (1898), the mortgagor obtained a loan extension from the mortgagee in exchange for executing a deed conveying to the mortgagee a portion of the mortgaged property. The deed was placed in escrow, to be released to the mortgagee only upon a default, at which point the debt would be extinguished. When the mortgagor defaulted and the deed was released, the mortgagor sought to have the deed declared void under section 2889 of the California civil code. The court refused to treat the deed as a mortgage, instead recognizing it as a valid subsequent and conditional contract between mortgagor and mortgagee to transfer title.[4] 52 P. at 302; *see also McDonald v. Huff*, 19 P. 499, 77 Cal. 279 (1888); *Deming v. Smith*, 66 P.2d 454, 19 Cal.App.2d 683 (Cal.Ct.App. 1937); *Baldwin v. American Trading Co.*, 243 P. 710, 76 Cal.App. 80 (Cal.Ct.App. 1925). The transaction in the present case is substantially the same as that at issue in *Bradbury*.

We hold that the Guam courts erred in viewing the warranty deed and accompanying loan extension agreement as a mortgage rather than a conditional sale.[5]

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[4] The lower courts in the present case, in determining that the deed was a mortgage, may have been influenced by a Kansas case, *Holden Land & Live Stock Co. v. Interstate Trading Co.*, 123 P. 733, 87 Kan. 221 (1912), which criticized conditional sale agreements of the sort at issue here. Any reliance on *Holden* was misplaced. In the passage of its opinion containing that criticism, the Kansas court specifically identified California as a state in which conditional sale agreements are permitted. *See* 123 P. at 736 (citing *Bradbury*).

[5] Our holding makes it unnecessary for us to consider appellants' argument that the lower courts erred in determining that Hakubotan made a sufficient tender of all principal and interest it owed to Yasuda on November 21, 1986.

Hakubotan's final attempt to distinguish *Bradbury* and the similar cases cited above, on the ground that a debtor must actually default before a conditional sale agreement can be executed, is not persuasive. Hakubotan relies on *Hamud v. Hawthorne*, 338 P.2d 387, 390, 52 Cal.2d 78 (1959)), which stated that a mortgagor can, "subsequent to default," transfer ownership to the mortgagee and waive the right of redemption in a contract separate from and subsequent to the initial loan agreement. This statement does not establish a default requirement. First, the statement is dicta; the court invalidated the transfer at issue not because it was part of a subsequent agreement executed prior to default, but because the mortgagor had waived the right of redemption at the time of the initial loan. Second, there is at least one California case, not addressed in *Hamud*, in which the court found that a mortgagor had validly released the right of redemption after obtaining a loan but before defaulting. *See Graves v. Arizona Central Bank*, 272 P. 1063, 1064, 205 Cal. 715, 717 (1928). Finally, as a matter of policy, it makes little sense to require a default by the debtor before permitting the debtor to release its right of redemption on mortgaged property. The rule that a mortgagor may release that right in a subsequent transaction, "at *any* time after the execution of the mortgage," *Baldwin*, 243 P. at 712 (emphasis added), is a rule that benefits debtors, as it permits creditors to accommodate their difficulties in repayment prior to default and the initiation of foreclosure proceedings. Hakubotan sought, and Yasuda made, just such an accommodation.

The decision of the appellate division is REVERSED and REMANDED for entry of judgment in favor of appellants.

APPENDIX B

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM
APPELLATE DIVISION

Civil Case No. 88-00013A

S.C. Civ. Case No. 993-86

GUAM HAKUBOTAN, INC.,
Plaintiff/Appellee,

vs.

FURUSAWA INVESTMENT CORP., *et al.*,
Defendants/Appellants.

OPINION

[Filed Jan. 26, 1990]

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BEFORE: DUENAS, Senior Judge, MUNSON [1] and McDONALD,[2] District Judges

McDONALD, District Judge:

Defendants Yasuda Shoji KK, Furusawa Investment Corp., and Julale Investment Corp. appeal from the trial court's determinations as to their rights as creditors/mortgagees under a certain secured loan agreement with the appellee Guam Hakubotan, Inc. Finding no error, we affirm.

I.

This action has as its genesis a March 15, 1985 contract between plaintiff-appellee Guam Hakubotan, Inc. ("Hakubotan"), a company engaged in real estate development, and one Antonia Camacho for the purchase and sale of two parcels of land located in Tumon, Guam. According to the terms of that contract, the total purchase price of these parcels was to be $1.895 million. Of that amount, $20,000 was to be paid immediately by Hakubotan as an earnest money deposit; $380,000 was to be paid at the close of escrow, April 5, 1985; and the remaining $1.495 million was to be paid on an installment basis over a 10-year period, the payments being secured by a mortgage.

In order to raise the money needed to finance the Camacho transaction, as well as other projects, Hakubotan turned to defendant-appellant Yasuda Shoji KK ("Yasuda"), a Japanese corporation in the business of real estate finance. On April 1, 1985, Yasuda and Hakubotan entered into a contract whereby Yasuda agreed to lend Hakubotan 170 million yen, or approximately $654,000 for a period of one year, with interest to be paid at the beginning of each month at a rate of 1.5%/

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[1] The Honorable Alex R. Munson, United States District Court for the Northern Mariana Islands, sitting by designation.

[2] The Honorable Alan A. McDonald, United States District Court for the Eastern District of Washington, sitting by designation.

month. In accordance with Japanese custom, Hakubotan delivered to Yasuda post-dated checks for each of the monthly interest payments and for the final principal payment. As security for the loan, Yasuda received a mortgage on five contiguous parcels of land owned by Hakubotan, two of which being the two parcels Hakubotan acquired from Mrs. Camacho. The fair market value of all five parcels was, at that time, approximately $4,233,100.

Hakubotan timely made all of its interest payments on the Yasuda loan; however, on March 4, 1986, Hakubotan began making inquiries as to whether Yasuda would consider extending the March 31, 1986 principal repayment date. After some negotiation, the parties, on March 10, 1986, entered into a second contract whereby Yasuda agreed to extend the 170 million yen loan for six months, with interest again payable at a rate of 1.5%/month. As "consideration" for the extension, Hakubotan was required to execute a warranty deed for the five parcels previously mortgaged in favor of defendant-appellant Furusawa Investment Corp. ("Furusawa"), a company affiliated with Yasuda, which the appellants were permitted to record only upon the occurrence of one of two circumstances: (1) if Hakubotan defaulted on its April 1, 1986 payment to Mrs. Camacho, the senior mortgage holder on two of the five parcels; or (2) if Hakubotan failed to make all interest and principal payments owed Yasuda under the terms of the extension agreement. The contract further provided that if the deed was recorded, Yasuda would cancel Hakubotan's 170 million yen debt and assume Hakubotan's obligation to Mrs. Camacho, leaving Hakubotan with "no rights of redemption or any other rights whatsoever." Hakubotan then delivered to Yasuda six new post-dated checks, representing the six new monthly interest payments, along with one check post-dated to September 30, 1986, representing the principal balance.

Hakubotan failed to timely make its April 1, 1986 payment to Mrs. Camacho; it was successful, however, in getting an extension on that payment, which was eventually satisfied using additional money borrowed from the appellants. But in spite of Hakubotan's default, the defendants did not at that time exercise their contractual "right" to record their deed.

Sometime near the end of September, 1986, Hakubotan again asked the appellants for an extension of the 170 million yen loan. Again the parties entered into negotiations, which this time lasted several days, but ultimately they were unable to arrive at an agreement. On September 30, 1986, Yasuda attempted to deposit Hakubotan's check for the 170 million yen principal balance, but the check was returned for insufficient funds. On October 6, 1986, pursuant to the March 10, 1986 agreement, Furusawa recorded the deed. The present action was then immediately commenced, with Hakubotan naming as defendants Yasuda, Furusawa, and the Julale Investment Corp., another company affiliated with Yasuda. By way of a letter dated November 21, 1986, Hakubotan offered to pay the appellants "the full amount of the outstanding promissory note in yen, together with Furusawa's costs and attorney's fees" in exchange for return of its property. The offer was rejected.

Following a two-week bench trial, the trial court, by a Decision entered February 18, 1988, found that the March 10, 1988 agreement did not constitute a bona fide conditional sale contract, but was instead nothing more than a security transaction which, by its nature, was void according to statute and therefore unenforceable. The trial court further found that Hakubotan's November 21, 1986 offer to repay the outstanding debt obligation constituted a statutorily valid tender of payment, thus preventing any further accrual of interest. Judgment was then entered on March 16, 1988.

II.

As the parties take no issue with the trial court's factual findings, we review the legal issues presented here *de novo*. *In re Brown*, 743 F.2d 664, 666 (9th Cir. 1984).

A. *Nature of the Agreement*

Guam Civ. Code § 2889 states:

> All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void.

The mandate of this statute is obvious: A mortgagor, when entering into an agreement that provides that real property be used as security on a debt, may not in any way jeopardize his or her equitable right of redemption. The purpose of this statute is, of course, equally obvious: protection of the debtor. "[U]nder pressing necessities, [a debtor] will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus [the law prohibits these] conditions from being enforced and the property sacrificed." *Peugh v. Davis*, 96 U.S. 332, 337 (1878).

We are not unmindful of the fact that § 2889 in no way prohibits the outright sale by the mortgagor of his or her entire interest in the mortgaged property, whether immediate or only upon the occurrence of a future condition, and whether to a third party or to the mortgagee itself. *See e.g., Watson v. Edwards*, 105 Cal. 70, 38 P. 527 (1894). But because of the statutory prohibition against extinguishment of the mortgagor's right to redeem, any purported "sale" of mortgaged property to a mortgagee must necessarily be subjected to greater scrutiny to ensure that it is indeed a sale, and not merely a subterfuge. *See* Osborne, Nelson and Whitman, *Real Estate Finance Law* § 3.2 at 31-33 (1979). Thus, as was aptly stated by the Kansas Supreme Court:

> It is often said that after the execution of a mortgage the mortgagor may release to the mortgagee his 'equity of redemption' . . . . What is meant, however, as is shown by an examination of the cases cited in support of such statements, is merely that the mortgagor may at any time after the execution of the mortgage sell to the mortgagee outright all his interest in the property, by a conveyance operating at once, and in that sense release his right to redeem. But he cannot, even after the mortgage has been made, bind himself by an agreement that, if he does not pay his debt by a certain time in the future, he will forfeit all right to the property.

Holden Land & Livestock Co. v. Inter-State Trading Co., 87 Kan. 221, 227, 123 P. 733, 736 (1912), *appeal dismissed*, 233 U.S. 536 (1914).

As was noted by the trial court, the proper inquiry, upon a challenge to a sale absolute on its face of mortgaged property by a mortgagor to a mortgaee, is thus whether the agreement reached was in fact intended to be a sale as opposed to simply a form of security. Among the factors that should be considered in conducting such an inquiry are (1) the nature of the condition on which the "sale" was premised; (2) the amount of the consideration paid versus the value of the property transferred; (3) the nature of the transferee's status as a creditor and/or mortgagee; and (4) the financial status of the transferer at the time of the purported conveyance. Upon consideration of these factors, the trial court concluded—in light of the fact that the "sale" here was conditioned on default, the fact that the property transferred had a fair market value considerably in excess to the total debt forgiven, the nature of the relationship between the parties, and Hakubotan's tenuous financial condition—that the March 10, 1986 "conditional sale" agreement was, in actuality, a security transaction made in contravention of § 2889. We agree, and find that no error was committed in reaching this conclusion.

B. *Accrual of Interest*

Guam Civ. Code § 1504 states:

> An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof.

As the trial court observed, Hakubotan, in a letter to Yasuda dated November 21, 1986, offered to pay Yasuda "the full amount of the outstanding promissory note in yen, together with Furusawa's costs and attorney's fees." The trial court committed no error in finding that this offer constituted a full and valid tender of payment for purposes of § 1504. *See Rader's Law etc. Co. v. S. Proctor Co.*, 40 Cal.App. 624, 181 P. 71 (1919).

AFFIRMED.

/s/ Cristobal C. Duenas
CRISTOBAL C. DUENAS
Senior Judge

/s/ Alex R. Munson
ALEX R. MUNSON
District Judge

/s/ Alan A. McDonald
ALAN A. MCDONALD
District Judge

APPENDIX C

IN THE SUPERIOR COURT OF GUAM
TERRITORY OF GUAM

Civil Case No. 993-86

GUAM HAKUBOTAN, INC.,
Plaintiff,

vs.

FURUSAWA INVESTMENT CORPORATION,
JULALE INVESTMENT CORPORATION, and
YASUDA SHOJI KK, a Japanese Corporation,
Defendants.

DECISION
FINDINGS OF FACT
CONCLUSIONS OF LAW

[Filed Feb. 18, 1988]

This matter came before the Court for a bench trial on 30 November, continuing on 1-5, 7, 14 and concluding 15 December 1987. Plaintiff was represented by Lawrence J. Teker, Esq.; Frederick J. Kerley, Esq. appeared for defendants.

Plaintiff Guam Hakubotan Inc. is a subsidiary of Guam Hakubotan Enterprises and was organized for real estate and hotel development. The principle shareholder and president of both of these entities is Toshio Okuhama.

The president and principle shareholder of all three defendant corporations is Koretsu Furusawa. These corporations are involved in investment, money lending and real estate.

This trial spanned nine days as the Court heard testimony from twelve witnesses. The principle witnesses, Toshio Okuhama, Koretsu Furusawa and Furusawa's General Manager for Yasuda Shoji KK, Kenichi Kakishima, do not speak English. As a result the Court heard the translation of their Japanese testimony through four different translators whose breadth of English vocabulary differed markedly, although all were stipulated as acceptable to counsel who presented them to the court.

In such a trial before the court sitting without a jury, the judge sits as trier of fact and is entitled to consider all the evidence and to draw therefrom such inferences as are reasonable and proper under the circumstances, even though another inference equally reasonable might also be drawn therefrom. Determinations as to the credibility of witnesses and the weight to be given their testimony are all matters within the sound province of the trial court. *See*, 76 Am. Jur. 2d, *Trial*, § 1239 (1971); *Isaacson v. Obendorf*, 99 Idaho 304, 581 P.2d 350 (1978).

It should be noted that the task of judging the credibility of the principle witnesses in this case was made exceedingly difficult because of the need for translation. The finer nuances of one's testimony as revealed in one's choice of words as well as the intonation and inflection of speech, all of which aid the trier of fact in arriving at truth, are lost in emotionless translation. Nevertheless, this Court is compelled to make its factual findings from the widely disparate factual recitations of the witnesses. Hampered in its task of weighing witness credibility, the Court has found it necessary to seek instead what would be the logical interpretation of the factually disputed transactions.

The plaintiff's ultimate legal contention in this case is that a certain warranty deed executed in favor of defendants is actually a mortgage thereby necessitating the procedure of foreclosure and recognition of plaintiff's equitable right of redemption. Defendants counter that the

document in question is a warranty deed, absolute on its face, which represents a conditional sale of the property which had been previously mortgaged to defendants.

The following facts appear not to be in dispute and provide the background against which this suit arose.

On 1 April 1985, the plaintiff borrowed 170 million yen from defendants in order to purchase certain property belonging to Antonia Camacho in Tumon, Guam. The agreement entered into between the parties provided that the debt would bear interest at the rate of eighteen percent (18%) per annum, payable monthly, and that the principle would be repaid in one installment due 1 April 1986. (Plaintiff's Exhibit 1). The debt was evidenced by a promissory note and was secured by a mortgage on five parcels of property in Tumon, Guam. (Defendants' Exhibits A and B). The mortgage covered Lot Numbers 5131, 5131-1, 5126-3-R1, 5132-R1 and 5126-1, Tumon, Dededo, Guam. A sixth parcel, Lot 5126-3-1, was added to further secure the mortgaged indebtedness to defendants on 21 October 1985. (Plaintiff's Exhibit 2). Upon securing the loan, plaintiff gave defendants twelve post-dated checks; eleven representing the monthly interest payments and one representing the principle amount. The first monthly interest payment was subtracted from the principle loan amount which plaintiff received.

On 2 April 1985, plaintiff executed a promissory note in favor of Antonia G. Camacho in the amount of $1,495,000 secured by a mortgage on the two parcels of Tumon property, Lots 5131 and 5131-1, purchased thereby (Defendants' Exhibits M and M-1). Antonia G. Camacho thus held the senior mortgage on plaintiff's Tumon property, Lots 5131 and 5131-1, while defendants, which took their mortgage on 3 April 1985, were the junior mortgagees.

On 4 and 5 March 1986, Okuhama met with Furusawa in Japan and related that he would have some difficulty in making payment of the principle amount due 1 April

1986. As a result, the parties entered into an agreement on 10 March 1986 which allowed the plaintiff a period of six months, until 30 September 1986, to make the principle payment of 170 million yen. This agreement required plaintiff to execute a warranty deed for the mortgaged Tumon properties in favor of defendants.

The 10 March 1986 agreement provided that the deed so conveyed would not be recorded by defendants unless plaintiff failed to make the 30 September 1986 principle payment or the 2 April 1986 installment payment on the Camacho mortgage. At this time, plaintiff gave defendants six post-dated checks representing interest due for the period 1 April 1986 to 30 September 1986. Plaintiff also gave a new check for the principle amount of 170 million yen post-dated to 30 September 1986.

Plaintiff did not make the 2 April 1986 installment payment of approximately $250,000 due on the Camacho mortgage; however, on 14 April 1986, plaintiff paid $110,006.60 to Camacho and received an extension until 1 May 1986 in which to pay the balance due on the installment. On 1 May 1986 plaintiff borrowed $160,000 from defendants in order to pay the remaining balance.

On 16 May 1986 plaintiff and defendants executed an agreement with reference to the $160,000 loan. The language of this agreement incorporated the terms of the 10 March 1986 agreement and provided plaintiff one month within which to repay the $160,000 loan to defendants. Plaintiff timely repaid the $160,000 loan.

In September of 1986, plaintiff once again approached defendants requesting more time in which to repay the 170 million yen loan. On 25 September 1986 plaintiff met with Furusawa and Kakishima at defendants' offices in Tokyo, Japan to discuss this matter. Then, on 26 September 1986, plaintiff again visited defendants' office in Tokyo and left behind two checks with Kenichi Kakishima before leaving for Guam. One check was issued

for 8,875,000 yen while the other check, post-dated to 15 January 1987, was for 170 million yen.

In late September and early October 1986, several more meetings took place on Guam between the parties or their representatives. All of these meetings were, in one form or another, geared towards a resolution of the parties' agreement with regard to the 170 million yen loan. Finally, on 6 October 1986, defendants recorded the warranty deed thus culminating the series of events which gave rise to the instant litigation. On 21 November 1986, plaintiff sent a letter to defendants offering to pay the principle amount of 170 million yen together with interest accrued to that date. This offer was refused.

While the foregoing outlines the basic chronology of the transactions between the parties, what actually was agreed upon during those transactions is in controversy. There is little if any factual disagreement as to the initial loan agreement, under which plaintiff borrowed 170 million yen secured by a mortgage on its Tumon properties. However, the rest of the transactions between the parties are subject to factual dispute.[1]

The most fundamental disagreement between the parties is the purpose and effect of the 10 March 1986 agreement. Okuhama maintains that the warranty deed conveyed to defendants pursuant to this agreement was nothing more than additional security for repayment of the 170 million yen loan. (Okuhama Direct, Tape 8050 at 3220). Okuhama also stated that Furusawa requested the deed but assured him that he would never use the deed against Okuhama. (*Id.*). Finally, Okuhama stated that he never told Furusawa that he was unable to pay

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[1] While there are disputes as to the agreements reached in the 25 and 26 September meetings, as well as the meetings of late September and early October, their factual resolution is not necessary to the disposition of this litigation. Accordingly, the Court makes no findings as to these events except as is necessary in the context of the following discussion.

the debt by 1 April 1986; rather, that he said he simply wanted an extension of time for six months. (Okuhama Cross, Tape 8142 at 3804).

Furusawa, on the other hand, testified that the 10 March 1986 agreement was a conditional sale and purchase and not a further security transaction. (Furusawa Cross, Tape 8163 at 4201). He stated that Okuhama requested the six month extension because he did not have enough money to pay the 170 million yen debt due 1 April 1986. (Furusawa Direct, Tape 8149 at 2411). Furusawa maintains that after he initially refused Okuhama's request for an extension, Okuhama, on the following day, offered to deed the Tumon properties covered in the mortgage to Furusawa. (Furusawa Direct, Tape 8149 at 2780 et seq.). Further, he asserts that if Okuhama failed to make payment of the principle at the end of the extension period, or failed to make the April installment on the Camacho mortgage, it was settled that Furusawa could record the deed thus transferring title in the Tumon properties to Furusawa. (Furusawa Direct, Tape 8149 at 3054). Finally, Furusawa denied that he ever told Okuhama that he was merely holding the deed as security and would never record it. (Furusawa Direct, Tape 8150 at 1963).

As the foregoing discussion illustrates, the central issue for the Court's consideration concerns the alleged transfer of Okuhama's equitable right of redemption via the warranty deed given pursuant to the 19 March 1986 agreement.

Mortgagors have utilized many vehicles in a vain search for a method of eliminating a mortgagor's right to the redemption of a defaulted mortgage through payment of the mortgaged debt prior to a foreclosure sale of the property. However, the Courts have steadfastly refused to allow a mortgagor to release his equitable rights of redemption contemporaneously with the execution or renewal of a mortgage.

> This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed.

Peugh v. Davis, 96 U.S. 332, 337, 24 L.Ed. 775 (1878).

However, the general prohibition against "clogging" the mortgagor's equity of redemption does not apply to transactions subsequent to the creation of the mortgage. Accordingly, a mortgagor may transfer the equity of redemption to the mortgagee in a transaction subsequent to the original mortgage transaction. A majority of courts adhere to this principle of law although such a transaction is viewed as inherently suspect and will be scrutinized to insure that the sale is free from fraud or oppression on the part of the mortgagee and is based on an adequate new consideration. *See*, Osborne, Nelson and Whitman, *Real Estate Finance Law*, § 3.2, p.32 (West 1979).

The California courts, in interpreting the prohibition of Civil Code § 2889,[2] are in accord and hold that § 2889 does not apply to transactions entered into subsequent to the original mortgage. *Bradbury v. Davenport*, 120 Cal. 152, 52 P.301 (1898); *Watson v. Edwards*, 105 C. 70, 38 P.527 (1894).

> A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee where the transaction is fair, honest, and without

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[2] California Civil Code § 2889 is identical to Guam Civil Code § 2889 and provides that "[a]ll contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void."

> fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses, and with their eyes open, could not make such a contract. The doctrine, "once a mortgage, always a mortgage," does not refer to future contracts. In Washburn on Real Property it is said that the character of a mortgage cannot be changed "by an agreement of the parties made at the time of the execution of the deed," and that "equity will not admit of a mortgagee embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into in order to effect a loan"; but that "this does not preclude any subsequent bona fide agreement in respect to the estate between the parties," and that "the mortgagee may always purchase the mortgagor's right of redemption, and thus acquire an absolute title." Volume 2 (5th Ed.) top paging 65, 66, § 23,24. Section 2889 of the Civil Code does not change the rule.

Watson v. Edwards, 38 P. 527, 529 (1894).

A principle contention advanced by plaintiff in this case is that while a mortgagor may so convey the equity of redemption, such a transaction may take place only *after* a default on the underlying mortgage. For this proposition, plaintiff relies on the California Supreme Court case *Hamud v. Hawthorne*, 52 Cal.2d 78, 338 P.2d 387 (1959). The Court in *Hamud* held that §§ 2889, 2924 and 2953 of California's Civil Code render invalid any agreement purporting to waive or restrain a mortgagor's redemption rights made contemporaneously with the execution of a mortgage.

The Court commented on California's precedent upholding the sale of a mortgagor's equity of redemption when made subsequent to the initial mortgage instrument in order to distinguish those cases from the case before it.

The Court stated that:

> As observed in *Bastajian v. Brown*, (1937), 57 Cal. App.2d 910, 915 [4], 135 P.2d 374, 137 P.2d 475, "Transfers of mortgaged properties by mortgagors to mortgagees for the purpose of avoiding foreclosure proceedings * * * have not been uncommon occurences * * * [and] have been held valid by the courts where the transactions were fair and honest * * * (*Baldwin v. American Trading Co.* [1925], 76 Cal.App. 80, 243 P. 710; *Demming v. Smith* [1937], 19 Cal.App.2d 683, 66 P.2d 454; *Watson v. Edwards* [1894], 105 Cal. 70, 38 P. 527; *Phelan v. De Martin* [1890], 85 Cal. 365, 24 P. 725; 18 Cal.Jur. 68 et seq.)." (See also *McDonald v. Huff* (1888), 77 Cal. 279, 19 P. 499.) Each of the cited cases, however, involved a situation wherein an original loan contract was first entered into providing for a note secured by a deed of trust or mortgage and, *after* default in payment, the parties entered into a *separate, distinct* and *subsequent* contract which provided for the conveyance of the subject property to the mortgagee or beneficiary, either forthwith or upon default after a further time extension granted in the contract made *subsequent* to default.

Hamud v. Hawthorne, 52 Cal.2d 78, 83, 338 P.2d 387, 390 (1959) (emphasis in original).

The Court did not, however, hold that a default is necessary before a mortgagor can sell or transfer the equity of redemption. That question was simply not before the Court. The fact that most such sales will in fact be consummated subsequent to default is simply a matter of logic. What possible incentive would a mortgagor in good standing have for conveying away such a vital equitable right? These transactions usually take the form of a deed in lieu of foreclosure by which a defaulting mortgagor, facing foreclosure, deeds the mortgaged property to the mortgagee in consideration for the extinguishment of the mortgage debt. The mortgagor thereby avoids any

possible deficiency judgment. The mortgagee, on the other hand, avoids the prolonged necessity and expense of a foreclosure sale.

The language of the cases and secondary sources confirm that a default is not necessary prior to transferring the equity of redemption. The essential requirement is simply that the transaction be subsequent to and separate and distinct from the initial mortgage transaction. *See*, T. Eisenberg, *Debtor-Creditor Law*, ¶ 31.03[B][1][c], p.31-36 (Matthew Bender 1986); Osborne, Nelson and Whitman, *Real Estate Finance Law*, § 3.2, pp.31-32 (West 1979); 59 C.J.S., *Mortgages*, § 818, p.1564; 1 Miller and Starr, *Current Law of California Real Estate*, § 3:113, p. 526 (Bancroft-Whitney 1975); 55 Am.Jur., *Mortgages*, § 1220, p.1001 (1971). All of the foregoing authorities have summarized, from the applicable cases, the necessary elements required to validly transfer the mortgagor's equity of redemption. None of the authorities supports plaintiff's contention that a default is a necessary element.

While it is well established that a mortgagor may, subsequent to the initial mortgage transaction and by a separate and distinct agreement, transfer the equity of redemption, an exception to this rule exists with regard to subsequent executory contracts. Thus:

> It is often said that after the execution of a mortgage the mortgagor may release to the mortgagee his 'equity of redemption'—using the term to denote his right to redeem after his default, or more properly, his actual title to the property, not referring to the statutory right to redeem after a sale on foreclosure. . . . What is meant, however, as is shown by an examination of the cases cited in support of such statements, is merely that the mortgagor may at any time after the execution of the mortgage sell to the mortgagee outright all his interest in the property, by a conveyance operating at once, and in that sense release his right to redeem. But he can-

> not, even after the mortgage has been made, bind himself by an agreement that, if he does not pay his debt by a certain time in the future, he will forfeit all right to the property.

Holden Land & Livestock Co. v. Inter-State Trading Co., 87 Kan. 221, 227, 123 P. 733, 736 (1912), appeal dismissed 233 U.S. 536, 34 S.Ct. 61, 58 L.Ed. 1083 (1914). This rule is merely an application of the reasoning applied to the initial mortgage transaction.

> The bases for the policy supporting the rule are the necessity of the borrower to obtain the loan coupled with an optimistic overconfidence in his capacities to surmount future difficulties. The two combine to lead to over-sanguine commitments. Both are present at the time the mortgage is entered into originally. When the transaction is subsequent to the mortgage and is consummated at once, neither exerts any influence. However, if it is a subsequent agreement for *future* forfeiture, the "mirage of hope" is sufficiently strong to bring it under the general ban against forfeitures due to "misreliance upon airy hope."

Osborne, Nelson and Whitman, *Real Estate Finance Law*, § 3.2, pp.32.33 (West 1979) (emphasis in original).

California authority, forcefully relied upon by defendants, represents a position contrary to this rule. *See*, *Bradbury v. Davenport*, 120 Cal. 152, 52 P.301 (1898) (prospectively operative lieu deed upheld as not in contravention of § 2889 of California's Civil Code). The court in *Holden*, in reference to this contrary authority, stated that:

> The recognition of such a right in a few cases, of which *Bradbury v. Davenport*, 120 Cal. 152, 52 Pac. 301, is an example, seems to result from a failure to note the distinction referred to. Considerations of public policy forbid the enforcement of a contract,

> made by the borrower at the inception of his loan, that he will forfeit his interest in the property he offers as security if he fails to meet his obligation promptly. The same considerations apply with equal force where he makes a like contract upon a renewal of the loan or an extension of the time of its payment. To hold otherwise would be to deprive of the benefits of the rule those most in need of its protection. If at any time after the execution of a mortgage the mortgagee could, by an extension of time or upon any other new consideration, obtain from the mortgagor a valid agreement that if he did not pay the debt in full by a certain date he should forfeit the entire security, then virtually the ancient common-law mortgage would be still in vogue, its rigors unrelieved by any equity of redemption. The modern tendency is to extend, rather than to contract, the scope of equitable relief against forfeiture.

Holden Land & Livestock Co. v. Inter-State Trading Co., 87 Kan. 221, 227, 123 P.733, 736, (1912).

If the Court is to do justice to the public policy reasoning behind the rule prohibiting agreements clogging a mortgagor's equity of redemption, the decision as rendered in *Holden* must be held persuasive. It is an accurate reflection of the rule carried to a logical conclusion.

Nonetheless, the Court is also constrained by the judicial construction given California Civil Code § 2889 prior to the Guam Legislature's adoption of that Code provision.

> The Civil Code of California contains the identical statutes [§ 2889 and § 2803]. The United States Court of Appeals for the Ninth Circuit has held that statutes which were adopted by Guam are presumed to have the same scope and significance as they had been given by the Supreme Court of California at the time of adoption and further decisions by the

> Supreme Court of California shall be persuasive, if not binding.

Y Aleman Corp. v. Chase Manhattan Bank, 414 F.Supp. 93 (D.C. Guam 1975) (citing *Tubor v. Ulloa*, 323 F.2d 823 (9th Cir. 1963). *See Also, Roberto v. Aguon*, 519 F.2d 754 (9th Cir. 1975) (decisions of California courts which predate the enactment of the Territorial Laws are controlling authority on issues of the statutory construction and effect of Guam laws, and California cases subsequent to the adoption of the Guam codes while not binding, are persuasive).

Several decisions of the California courts predating enactment of the Territorial Laws, have upheld transactions whereby a necessitous mortgagor transferred his equity of redemption via a prospectively operative lieu deed. *See, McDonald v. Huff*, 77 Cal. 279, 19 P. 499 (1888); *Bradbury v. Davenport*, 120 Cal. 152, 52 P. 301 (1898); *Baldwin v. American Trading Co.*, 76 Cal.App. 80, 243 P. 710 (1925); *Demming v. Smith*, 19 Cal.App.2d 683, 66 P.2d 454 (1937).

Defendants rely strongly on these decisions of the California courts and argue that the present case should be decided in a like fashion since it represents a factual situation similar to California cases upholding the prospectively operative lieu deed transaction.

However, this Court's inquiry does not end quite so abruptly. Defendants have repeatedly referred to a deed in lieu of foreclosure as an important business tool; however, the wielding of such a tool is subject to many pitfalls.

As California itself has recognized, one of those pitfalls is that mortgagors often attack such transactions by arguing that they effect a mortgage and not an absolute conveyance. As stated by Miller and Starr in their treatise on California real estate: "Under some circumstances the court may find the transfer of title was

merely intended as a further security." 1 Miller and Starr, *Current Law of California Real Estate*, § 3:52, p.414 (Bancroft-Whitney 1975). This comment is made in the context of a discussion by the authors of how to avoid the various pitfalls of the deed in lieu of foreclosure transaction. Similarly, the authors of Cont. Ed. Bar, *California Mortgage and Deed of Trust Practice*, § 6.34, p.291 (1979), caution the use of what they describe as a conditional lieu deed which operates as less than "a final and complete passage of title from trustor to beneficiary and as a cancellation of all related financial obligations between them."

Both Miller and Starr and the publication by the California Continuing Education of the Bar cite to *Beeler v. American Trust Co.*, 24 Cal. 2d 1, 147 P.2d 583 (1944) and, more recently in supplements to their respective works, to *Strike v. Trans-West Discount Corp.*, 92 Cal. App. 3d 735, 155 Cal. Rptr. 132 (1979), as cases in which prospectively operative lieu deeds were held to be mortgages and not an absolute sale.

In *Beeler*, the trustor under a deed of trust, in order to obtain further time in which to pay the outstanding indebtedness secured thereby, conveyed the property subject to the trust to the beneficiary. The beneficiary-grantee in turn executed a one year lease back to the trustor-grantor with an option to purchase anytime within that year. The trustor also contemporaneously executed an affidavit which recited that the conveyance was absolute and not intended as a mortgage, trust conveyance or security of any kind.

The Court, looking behind the facade of the transaction, held that the agreement was not an absolute sale but was instead intended as a further security transaction.

> A deed absolute on its face may be shown by parole to be intended as a mortgage. . . . Equity looks beyond the mere form in which the transaction is

> clothed, and shapes its relief in such way as to carry out the true intent of the parties to the agreement; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, their relations to one another and to the subject matter, are subjects for consideration.

Beeler, 147 P.2d at 594 (quoting *Vance v. Anderson*, 113 Cal. 532, 538, 45 P. 816, 818 (1896)).

> To insist on what was really a mortgage, as a sale, is in equity a fraud, *which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be.*

Id. (quoting *Peninsular Trading & Fishing Co. v. Pacific Steam Whaling Company*, 123 Cal. 689, 694, 56 P. 604 606) (emphasis in original).

Accordingly, this Court will not be bound simply by the terms of the 10 March 1986 agreement as defendants urge, but will, instead, consider all the facts and circumstances of the transaction in determining whether that agreement is, in fact, what defendants claim it to be or simply a disguised security transaction.

The burden of establishing that a deed absolute on its face was in fact intended as a mortgage is on the party so claiming. This burden may only be met by clear and convincing proof. *Spataro v. Domenico*, 96 Cal.App.2d 411, 216 P.2d 32 (1950). If a sale was in fact intended, the burden of proof then shifts to the mortgagee-grantee to establish that the purchase of the mortgagor's equity of redemption was free from fraud, undue influence, oppression and based on an adequate consideration. *Bradbury v. Davenport*, 114 Cal. 593, 600, 46 P. 1062, 1063 (1896).

Courts consider the following factors in determining whether a deed absolute on its face was in fact intended

as a mortgage: (1) Whether there is an indebtedness on the part of the grantor left unaffected by the conveyance; (2) Whether the amount paid by the grantee as purported consideration for the transfer is substantially less than the value of the property; (3) Whether the grantor retained possession of the land; (4) Whether the grantee was a money-lender by occupation; (5) Whether the grantee was in the business of buying and selling property of the description conveyed; (6) Whether the transferor was in financial difficulties at the time of the execution of the conveyance; (7) Whether the grantor continued to pay taxes subsequent to the deed; (8) Whether the grantee retained possession of the uncancelled note or mortgage. *See*, Osborne, Nelson and Whitman, *Real Estate Finance Law*, § 3.1, pp. 41-43 (West 1979). *See Also*, Annot., 29 ALR 1435 (1940).

The language of the 10 March 1986 agreement, which defendants maintain represents a conditional sale of the mortgagor's interest, reveals the presence of several of these factors.

The 10 March 1986 agreement provided, in part, as follows:

> WITNESSETH:
>
> Whereas, the Mortgagor executed a mortgage in favor of Mortgagee on April 3, 1985, herein "Mortgage", and under the terms of the Promissory Note attached therewith, Mortgagor was required to repay the principle of One Hundred Seventy Million Yen in lawful money of Japan with interest as may have accrued by April 1, 1986; and
>
> Whereas, the Mortgagor is unable to pay the principal and interest timely to Mortgagee as required under said promissory note and hereby requests extension of time to repay the said promissory note to Mortgagee and
>
> NOW, THEREFORE, the parties hereto agree as follows:

> 1. Extension of Time: The *Mortgagee* hereby *agrees to grant* to the Mortgagor *a six (6) months extension* of time *to repay* in full on or by September 30, 1986 *the* aforesaid *promissory note secured by mortgagee* in the amount of One Hundred Seventy Million Yen in lawful money of Japan with interest as stated in the promissory note, and the rate of interest for the additional six (6) months extended period shall be at the same rate as that stated in the promissory note for the initial year period. (emphasis added).

This language evidences the parties' belief that the 170 million yen debt was still in existence and secured by a mortgage on the Tumon properties. Okuhama would be entitled to the return of the warranty deed upon repayment of the same 170 million yen debt which the mortgage initially secured. Further, Okuhama was to pay the same rate of interest for the six month extension period as that stated in the promissory note for the initial one year period. Thus, it appears that the parties considered that the debtor/creditor—mortgagor/mortgagee relationship would continue with respect to the 170 million yen debt and interest thereon.

That the mortgage continued is also evidenced by the fact that the terms mortgagor and mortgagee are used to refer to the parties throughout the document. Also, the parties referred to the substance of the agreement as an "extension of time to repay . . . the . . . promissory note secured by mortgagee . . . ." Accordingly, it appears that the mortgage was not extinguished but, rather, merely extended.

The evidence adduced at trial also discloses the intentions of the parties. On cross-examination Furusawa testified that the security for the $160,000 loan, which was the subject of the 16 May 1986 agreement, was the Tumon land. (Furusawa Cross, Tape 8165 at 2382). The 16 May 1986 agreement expressly incorporated all

of the terms and conditions of the 10 March 1986 agreement. Therefore the two agreements are to be considered one. Accordingly, Furusawa cannot logically maintain that the Tumon land represented security for the $160,000 loan but not for the 170 million yen loan.

Furusawa's testimony also revealed that he understood the mortgage was not sufficient security for an extension of the loan to 30 September 1986. He testified that because of this, Okuhama agreed to deed the Tumon properties to Furusawa so that foreclosure proceedings would be unnecessary. (Furusawa Cross, Tape 8163 at 3866 et seq.). It appears, therefore, that Furusawa simply wanted a quicker means of resorting to the Tumon security should an extension be granted.

The testimony also revealed that Okuhama continued to proceed with his plans to develop a hotel on the property even after execution of the 10 March 1986 agreement. Plaintiff's Exhibit 21 illustrates that these plans were still proceeding as of 17 April 1986. These are not the actions of one who has sold his property.

Further indications that a mortgage was effected include the fact that Okuhama was undeniably in financial difficulties at the time of the 10 March 1986 agreement and the fact that the note and mortgage were retained *uncancelled* by Furusawa. Finally, while it was established that Furusawa is a money-lender (indicative of a security relationship), the evidence also revealed that he was involved in real estate so that he might very well be interested in buying and selling the property here at issue. (Furusawa Direct, Tape 8149 at 858).

The final factor in ascertaining the character of the 10 March 1986 agreement concerns the amount of consideration purportedly paid by Furusawa for the purchase of Okuhama's Tumon properties. Both parties presented the testimony of expert witnesses to establish the fair market value of the Tumon property as of 10 March 1986.

Defendants' appraisor, Charles Griffin, testified that the property had a value of $55.15 per square meter. (Griffin Direct, Tape 8195 at 2450). The subject property has a combined area of 42,331 square meters which would work out to a fair market value of $2,335,000.

Plaintiff's appraisor, Tim Taunton, testified that the property had a value of $117 per square meter which would equal a fair market value of $4,952,727. (Taunton Direct, Tape 8199 at 3057).

If the 10 March 1986 agreement were held valid, defendants would have paid a total of $2,423,706. This figure represents the 170 million yen debt computed into United States currency at the 8 March 1986 exchange rate of approximately 180 yen to the dollar plus the remaining balance due on the Camacho mortgage of $1,479,262 which defendants agreed to assume.

The appraisal experts differed in their estimates of the fair market value by approximately 2.6 million dollars. Griffin's testimony, if accepted, would support a finding that the sale, if so intended, was on fair and reasonable terms. Taunton's testimony, on the other hand, would lead to the conclusion that the consideration paid by Furusawa was terribly inadequate.

Both counsel found severe fault with the methodologies employed by the opposing party's expert. Accordingly, the Court would have difficulty in accepting the valuation of either appraisor at face value.

The testimony of Charles Griffin, however, appears to be somewhat more suspect then that given by Tim Taunton. Griffin states in his appraisal report that lots 5132 R-1 and 5126-1 (parcels 4 & 5 in scheme one of Griffin's appraisal report)[3] had a fair market value of $100 a

[3] Griffin utilized two schemes in ascertaining the fair market value of the subject property. In Scheme One Griffin paired the six parcels which comprise the subject property and ascertained the value of

square meter. *See*, Defendant's Exhibit EE, p. III-3. Lot 5132 R-1 is the only lot of the six parcels, when considered independently, which has frontage on San Vitores road. Griffin places a higher value on lots which have frontage on San Vitores road. (*Id.*) Thus, while lots 5132 R-1 and 5126-1 had an independent value of $100 a square meter, Griffin reduced their value to $55.15 a square meter when considered as a whole with the remaining four parcels.

Griffin testified that the highest and best use of property in the Tumon Bay area was for hotel development. (Griffin Direct, Tape 8195 at 2115). Accordingly, by the addition of the remaining four parcels to parcels 4 and 9, the property, as a whole, would have frontage on San Vitores road and would be large enough for a major hotel project such as that contemplated by Okuhama (Twelve story Hyatt Regency).

Griffin's logic would hold that by adding additional parcels to the parcels with San Vitores road frontage (which Griffin valued at $100 a square meter) so that the highest and best use for property in Tumon Bay may be attained, the fair market value of the property would correspondingly drop to $55.15 a square meter. The Court cannot accept this conclusion.

Plaintiff's counsel also had difficulty with this logic as the following discourse, concerning Griffin's comparable sale number one, discloses:

> Q. Do you think that this comparable number one piece of property is a better price of property than the subject property?
>
> A. No.

---

each pair independently based on comparable land sales. (*See*, Defendant's Exhibit EE, p. III-3). In Scheme Two Griffin ascertained the value of all six parcels combined and valued as a single lot. (*Id.*) The comparable sales utilized in Scheme Two are the same sales used in Scheme One to value lots 5131 and 5131-1.

Q. It's not better?

A. No.

Q. Do you think the subject property is better?

A. Yes.

Q. Why?

A. Well, of course the subject property is larger, it is fairly level and more developable site. This comparable could be developed into a hotel or it could be developed into condominium use even though it's on a hillside, very nicely. So they're both equal in development, they could both be developed equally.

Q. Well, if this property was like let's say between $82 and $100 a square meter, and the subject property was valued at only $55 a square meter, but yet the subject property is a better piece of property why did you assign it such a small value?

A. Well larger properties generally sell at less than, a the smaller price we're talking 42,000 plus square meters against 11,000 so if somebody's going to buy a smaller piece of property they're going to have to pay a little higher value for it than they will a larger piece.

Q. I think that Mr. Griffin that is absolutely correct in the general sense of the word.

A. Well, I think it bears out with this $60 sale value on that one lot.

Q. Except in Tumon Bay, I mean we're all familiar with this theory that the smaller the lot the higher it is in per square meter value. The larger the lot the lower it is in square meter value. Correct. I think that's a general proposition that's probably born out by sales. Except in Tumon Bay and except in situations where you need a big chunk of property to develop for a hotel. Because there are very few available down there. It's very difficult to buy all those little lots and put them all together to put them into a big lot. So when you can find a

big lot then it's more valuable than a small lot. Isn't that generally true?

A. Generally.

(Griffin Cross, Tape 8196 at 75 et seq.).

The Court finds this admission by Griffin to be fatal to the assumption upon which his appraisal methodology is based, i.e., that smaller properties in the Tumon Bay area will have a higher per square meter value than larger properties.

Other steps undertaken by Griffin in bringing in this low fair market value were also rendered questionable by his own testimony and that of Taunton. This is most evidently illustrated by his use, in Scheme Two, of a 1982 long term lease. This property was leased out at $35 a square meter although Griffin adjusted it upward to $52.67 a square meter. Taunton testified that a lease should never be used when a fee simple is available.

(Taunton Direct, Tape 8199 at 2197).

That a fee simple was available is illustrated by Taunton's use of what was described as the Miner properties. The Miner properties are comprised of six parcels, four of which concern us here. They are Lot Numbers 5052-8-NEW-2, 5052-8-NEW-3, 5052-8-NEW-4 and 5052-8-NEW-5. The first of the above lots, which Griffin utilized as comparable sale number eight in Scheme One of his appraisal report,[4] was sold on 28 June 1985 to Jui Dai Enterprises for $105.76 per square meter. The balance of the above mentioned Miner properties were sold to the same buyer on 29 July 1985 for cash at $106.51 a square meter.

Taunton testified that because the later three lots referred to above were sold on the same day to the same

[4] Lot Numbers 5052-8-NEW-4 and 5052-8-NEW-5 were also utilized in Scheme One of Griffin's report as comparable sale numbers nine and ten respectively. Griffin, however, did not use Lot Number 5052-8-NEW-3.

buyer for cash, it was appropriate that they be considered as one sale for purposes of comparison. (Taunton Direct, Tape 8199 at 2415). As such, they would constitute one parcel of approximately 10,700 square meters which is roughly equivalent to the parcels utilized by Griffin in Scheme Two of his appraisal report. The Court finds suspect the fact that Griffin had available a 1985 comparable of 10,700 square meters which sold for $106.51 per square meter yet chose to utilize a 1982 leasehold which went for $35.11 per square meter.

Further, on comparable sale number one, Griffin subtracted approximately $200,000 from the sale price of the property to account for improvements on the land. This reduced the value of the property from $100 a square meter to $82.24 a square meter. When pressed to identify improvements which would equal $200,000, Griffin was able to reference only a few wooden structures and some asphalt paving. (Griffin Cross, Tape 8195 at 4185 et seq.). Griffin also subtracted 45% from the value of comparable number one based on property characteristics although, as the earlier discourse illustrated, Griffin felt the subject property was a *better* piece of property than comparable number one.

Griffin's evaluation is also rendered suspect by the following discourse in which plaintiff's counsel was probing the escalation of land values in Tumon Bay. In reference to what was described as the Top Enterprise properties, the following exchange took place:

> Q. So [the Top Enterprise properties] tripled in value from 1982 to 1985. About.
>
> A. Only one piece and the only reason that lot went for $140 square meter was the fact that it had been coraled out and was level with the fronting marine, with San Vitores road. *All of the rest of the properties all had not been coraled out.* So that was the reason it went for a higher price because there was more money involved in that lot.

Q. . . . So this piece of property that sold in 1985 for $140 a square meter roughly tripled from 1982 to 1985 then right?

A. Yes, but that ——— I don't believe that was due to time. That was not due to time.

Q. Well what was it due to?

A. It was due to the fact that when the original lot was there it was a very high lot. The owners of that lot that sold for $140 had gone in and taken all of the coral out and reduced the sloping lot to a very level lot it was level with the fronting road and back to the rear border of the property so they had the expense of taking all the coral out to make it level. It was worth a lot more in the after condition that it was in the before condition. And that's the difference between the $55 and the $140.

Q. In your opinion! What is the reason then these other ones jumped from 55 to $120 a square meter?

A. Actually on the same basis.

Q. For the same reason?

A. For the same reason.

(Griffin Cross, Tape 8196 at 3385 et seq.)

The "reason" advanced, of course, was the fact that it had been coraled out. However, Griffin had just stated that "[a]ll of the rest of the properties all had not been coraled out."

In conclusion, the Court finds Griffin's testimony inconsistent and unpersuasive. Griffin attributed a value of $100 a square meter to lot 5132-R-1 which individually fronts San Vitores road. The Court, in light of the above, cannot then concur with him that the subject property, valued as one lot with frontage on San Vitores road, had a value of less than approximately $100 a square meter.

Further, the Court finds that valued at approximately $100 a square meter, the subject property would have a

fair market value of approximately $4,233,100. As such, the consideration purportedly paid by Furusawa, $2,423,-706, is substantially below the property's fair market value. As stated by the Supreme Court:

> The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding.

Peugh v. Davis, 96 U.S. 332, 24 L.Ed. 775 (1878). The Court cannot find that the purported consideration would be deemed reasonable if the transaction were between other parties dealing in similar property.

Considering the totality of facts and circumstances attendant to the 10 March 1986 agreement, the Court holds that passage of the warranty deed to defendants effected nothing more than a security transaction. Thus, recordation of the warranty deed on 6 October 1986 is held to be of no effect. Accordingly, plaintiff is still possessed of its equity of redemption and is entitled to redeem the property prior to a foreclosure sale of the property. Finally, because plaintiff offered to pay the principle amount due with interest as of 21 November 1987, interest stopped accruing as of that date. *See*, Guam Civ. *Code* § 1504.

The above constitutes findings of fact and conclusions of law in conformity with Rule 52 of the Guam Rules of Civil Procedure. Plaintiff to prepare judgment conforming to this decision.

SO ORDERED, this 18th day of February, 1988.

/s/ Janet Healy Weeks
JANET HEALY WEEKS
Judge
Superior Court of Guam

IN THE SUPERIOR COURT OF GUAM
TERRITORY OF GUAM

Civil Case No. 993-86

GUAM HAKUBOTAN, INC.,
Plaintiff,

vs.

FURUSAWA INVESTMENT CORPORATION, JULALE INVESTMENT CORPORATION, and YASUDA SHOJI KK, a Japanese Corporation,
Defendants.

ERRATA

[Filed Feb. 22, 1988]

In the 18 February 1988 decision of this Court, one inadvertent error was made:

1. Page 22, Line 25: "21 November 1987" should read "21 November 1986."

SO ORDERED, this 22nd day of February, 1988.

/s/ Janet Healy Weeks
JANET HEALY WEEKS
Judge
Superior Court of Guam

IN THE SUPERIOR COURT OF GUAM
TERRITORY OF GUAM

Civil Case No. 993-86

GUAM HAKUBOTAN, INC.,
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Defendants.

JUDGMENT

[Filed Mar. 16, 1988]

This action to have a deed absolute declared a mortgage came before the Court for a bench trial on November 30, 1987, continuing on December 1-5, 7, 14, and concluding December 15, 1987. Prior to trial, on November 24, 1987, the Court heard Defendants' motion for partial summary judgment on the claims set forth in Counts II and III of the First Amended Complaint. At said hearing and at trial, Plaintiff appeared by counsel, Lawrence J. Teker and Defendants appeared by counsel, Frederick J. Kerley. At hearing on Defendants' motion for a partial summary judgment, Plaintiff conceded the motion as to Count II and the parties stipulated and agreed that hearing and decision on Defendants' motion for partial summary judgment on Count III of the First Amended Complaint would be continued and consolidated with trial on the merits. At trial evidence, both oral and documentary, was introduced on behalf of both parties and the cause was argued and submitted for decision.

The Court rendered its decision herein on February 18, 1988, which decision constituted the Court's findings of fact and conclusions of law;

WHEREFORE, IT IS HEREBY ADJUDGED, ORDERED and DECREED, as follows:

1. That Count II of Plaintiff's First Amended Complaint be, and hereby is dismissed with prejudice, it being the finding and conclusion of the Court that the parties intended that the amount payable under the promissory note dated April 1, 1985, was One Hundred Seventy Million Yen (Y170,000,000), payable in lawful money of Japan.

2. The instrument executed by Plaintiff to Defendant Furusawa Investment Corporation in the form of a warranty deed dated March 12, 1986, and recorded in the Department of Land Management on October 6, 1986 as Instrument No. 376594, which purported to convey to Defendants the real property therein described, is hereby declared to be a mortgage of said property to secure payment of an obligation evidenced by a promissory note dated April 1, 1985, in the sum of One Hundred Seventy Million Japanese Yen (Y170,000,000).

3. Said note has a balance of principal and interest owing and unpaid on November 21, 1986, in the sum of One Hundred Seventy Million Japanese Yen (Y170,000,000) as principal, and Four Million Three Hundred Thirty-Five Thousand Yen (Y4,335,000) as interest, representing the time period from October 1, 1986, through November 21, 1986, which interest on the note stopped accruing as of November 21, 1986.

4. Within thirty (30) days of the date that this Judgment becomes final, Plaintiff may pay to Defendants said balance of One Hundred Seventy-Four Million Three Hundred Thirty-Five Thousand Yen (Y174,335,000), principal and interest, and Defendants shall then execute and deliver to Plaintiff a certificate of discharge of the

mortgage recorded at the Department of Land Management as Instrument No. 357345, and in order to clear the record title of said real property, execute, knowledge and deliver to Plaintiff, a quitclaim deed quitclaiming title to said real property to Plaintiff. In this context, this judgment shall not become final until the judgment is not appealed from and the time for appeal has passed or, in the event an appeal or appeals are taken, until the appellate process is exhausted and this judgment is affirmed and rendered final on mandate.

5. That Plaintiff is still possessed of its equity of redemption and is entitled to redeem the property prior to a foreclosure sale of the property.

6. The real property referred to herein is described as Lot Nos. 5131, 5131-1, 5126-3-1, 5132-R1, 5126-1, and 5126-3-R1, all situated in the municipality of Tumon, Dededo, Guam.

7. The Counterclaim of Defendants is dismissed, and the Defenadnts shall take nothing thereby.

8. That each party shall bear its separate costs.

DATED: Mar. 16, 1988.

/s/ Hon. Janet Healy Weeks
JANET H. WEEKS
Judge
Superior Court of Guam

APPROVED AS TO FORM:

GAYLE, TEKER & SCHNABLE
Counsel for Plaintiff

By: /s/ Lawrence J. Teker
LAWRENCE J. TEKER

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-15248

D.C. No. CV-88-0013A-CCD

GUAM HAKUBOTAN, INC.,
Plaintiff-Appellee,
v.

FURUSAWA INVESTMENT CORPORATION, JULALE INVESTMENT CORPORATION, and YASUDA SHOJI KK,
Defendants-Appellants.

ORDER

[Filed Jan. 13, 1992]

Before: SCHROEDER, FLETCHER, and FERGUSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

ORGANIC ACT OF GUAM, 48 USC §§ 1421 et seq.

§ 1424. District Court of Guam; local courts; jurisdiction

(a) District Court of Guam; local courts

The judicial authority of Guam shall be vested in a court of record established by Congress, designated the "District Court of Guam," and such local court or courts as may have been or shall hereafter be established by the laws of Guam in conformity with section 1424-1 of this title.

(b) Jurisdiction

The District Court of Guam shall have the jurisdiction of a district court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of Title 28, and that of a bankruptcy court of the United States.

(c) Original jurisdiction

In addition to the jurisdiction described in subsection (b) of this section, the District Court of Guam shall have original jurisdiction in all other causes in Guam, jurisdiction over which is not then vested by the legislature in another court or other courts established by it. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by the laws of Guam for the purpose of determining the requirements of indictment by grand jury or trial by jury.

§ 1424-1. Local courts; composition; appellate court; jurisdiction; practice and procedure; qualifications and duties of judges

(a) Composition; establishment of appellate court

The local courts of Guam shall consist of such trial court or courts as may have been or may hereafter be established by the laws of Guam. On or after the effective date of this Act, the legislature of Guam may in its discretion establish an appellate court.

(b) Jurisdiction

The legislature may vest in the local courts jurisdiction over all causes in Guam over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jursdiction shall be subject to the exclusive or concurrent jurisdiction conferred on the District Court of Guam by section 1424(b) of this title.

(c) Practice and procedure; qualifications and duties of judges

The practice and procedure in the local courts and the qualifications and duties of the judges thereof shall be governed by the laws of Guam and the rules of those courts.

§ 1424-2. Relations between courts of United States and courts of Guam; review by United States Court of Appeals for Ninth Circuit; reports to Congress; rules

The relations between the courts established by the Constitution or laws of the United States and the local courts of Guam with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the

courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings: *Provided*, That for the first fifteen years following the establishment of the appellate court authorized by section 1424-1(a) of this title, the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could be had. The Judicial Council of the Ninth Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

§ 1424-3. Appellate jurisdiction of District Court; procedure; review by United States Court of Appeals for Ninth Circuit; rules; appeals to appellate court

(a) Appellate jurisdiction of District Court

Prior to the establishment of the appellate court authorized by section 1424-1(a) of this title, the District Court of Guam shall have such appellate jurisdiction over the local courts of Guam as the legislature may determine: *Provided*, That the legislature may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the Government of the United States, or the conformity of any law enacted by the legislature of Guam or of any orders or regulations issued or actions

taken by the executive branch of the government of Guam with the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the United States.

(b) Appellate division of District Court; quorum; presiding judge; designation of judges; decisions

Appeals to the District Court of Guam shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The district judge shall be the presiding judge of the appellate division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the appellate division of any session shall be designated by the presiding judge from among the judges who are serving on, or are assigned to, the district court from time to time pursuant to section 1424b of this title: *Provided*, That no more than one of them may be a judge of a court of record of Guam. The concurrence of two judges shall be necessary to any decision of the appellate division of the district court on the merits of an appeal, but the presiding judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take or prosecute it in accordance with the applicable law or rules of procedure.

(c) United States Court of Appeals for Ninth Circuit; jurisdiction; appeals; rules

The United States Court of Appeals for the Ninth Circuit shall have jurisdiction of appeals from all final decisions of the appellate division of the district court. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

(d) Appeals to appellate court; effect on district court

Upon the establishment of the appellate court provided for in section 1424-1(a) of this title all appeals from the decisions of the local courts not previously taken must be taken to the appellate court. The establishment of that appellate court shall not result in the loss of jurisdiction of the appellate division of the district court over any appeal then pending in it. The rulings of the appellate division of the district court on such appeals may be reviewed in the United States Court of Appeals for the Ninth Circuit and in the Supreme Court notwithstanding the establishment of the appellate court.